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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 74-6761

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

DUNKLIN SULLIVAN
Assistant Attorney General

Attorneys for Petitioner
P. O. Box 12548
Austin, Texas 78711

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NO. _____

October Term, 1974

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, W. J. Estelle, Jr., respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on September 6, 1974.

OPINION BELOW

The opinion delivered in the court below is reported at 500 F.2d 206 (1974) and is appended to this Petition as Appendix "A". The opinion of the United States District Court for the Southern District of Texas is reported at 364 F.Supp. 335 (1973). and a copy is appended hereto as Appendix "B". A Stay of Mandate was granted by the United States Court of Appeals to and including December 5, 1974. Also attached as Appendix "C" is a copy of the

opinion of the Court of Criminal Appeals of Texas affirming Respondent's conviction.

JURISDICTION

As indicated above, the opinion of the United States Court of Appeals was entered on September 6, 1974. (See Appendix "A"). A copy of the judgment is attached hereto as Appendix "D".

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED

Whether a defendant's trial in jail clothing destroys the "presumption of innocence" so as to deny him a fair trial?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ."

The Fourteenth Amendment provides:

> ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Williams was convicted in the 177th Judicial District Court of Harris County, Texas, for the offense of assault with intent to murder with malice. Williams plead not guilty, was found to be guilty by the jury, and was assessed by the court as punishment confinement for ten years in the state penitentiary. The said judgment and sentence was appealed to the Court of Criminal Appeals of Texas, and said judgment of conviction was affirmed in an opinion delivered February 9, 1972, styled Williams v. State, 477 S.W.2d 24 (Tex.Crim. 1972). Williams in his state court appeal, raised substantially the same issue that was raised in his application for writ of habeas corpus in the United States District Court below, and in the United States Court of Appeals for the Fifth Circuit.

Respondent filed his application for writ of habeas corpus in the United States District Court for the Southern District of Texas, and on October 2, 1973, the District Court denied relief holding that Williams' trial in jail clothing, while inherently prejudicial, was under the facts presented, harmless error. Williams appealed this decision to the United States Court of Appeals, and on September 6, 1974, the Fifth Circuit reversed the holding of the United States District Court ruling that Williams' trial in jail clothing was inherently prejudicial and was not harmless error.

It is now the established rule in the Fifth Circuit that the trial of a criminally accused attired in prison clothing infringes the fundamental right to

the presumption of innocence. See Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971), cert. denied 404 U.S. 897 (1971), and Brooks v. State of Texas, 381 F.2d 619 (5th Cir. 1967). This per se rule adopted by the Fifth Circuit automatically upends the conviction of all defendants tried in jail clothing with the exception of the following modifications:

(a) When a defendant is on trial for a prison offense against a fellow inmate in an environment where such clothing is the normal attire, there is no prejudice for the jury to see that which is already known. United States ex rel Stahl v. Henderson, 472 F.2d 556 (5th Cir. 1973).

(b) If trial counsel intended to use jail clothing as a tactic to gain sympathy with the jury, no reversal is warranted. Garcia v. Beto, 452 F.2d 655 (5th Cir. 1972).

(c) If all of the facts lead unerringly to guilt, and no possible inference clouds or conflicts any essential or material fact, then the trial of a defendant in jail clothes may be harmless beyond a reasonable doubt. Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973).

REASONS FOR GRANTING THE WRIT

1. The Holding Of The United States Court Of Appeals For The Fifth Circuit That Trial In Jail Clothing Destroys A Defendant's Presumption Of Innocence And Thereby Deprives

Him Of A Fair Trial Is Not Judiciaily Sound.

Petitioner respectfully submits that the trial of a defendant in jail clothing does not suggest or indicate to the jury that the defendant is guilty. The fact that a defendant wore jail clothes during a jury trial does not create a negative inference. A juror could certainly be expected to know that many defendants who are arrested are kept in jail prior to the time they are brought to court for trial. This fact does not destroy the presumption of innocence and neither should the presumption of innocence be destroyed by their being seen in the courtroom in jail attire. A defendant's presence before the jury in jail clothing only confirms that he has been held in jail prior to the time of the trial, and Petitioner strongly maintains that this does not influence the jury to find the defendant guilty.

Petitioner states that the nature of clothing worn by a defendant is not so inherently prejudicial as to deny him his right to a fair and impartial trial, and that the testimony given in a case presently pending in the Fifth Circuit, Scruggs v. Estelle, No. 74-3180, supports this position. In Scruggs the following testimony developed at a state habeas hearing reflects the following by three jurors who testified at the state habeas hearing concerning the defendant's trial in jail clothes.

Juror Clemons:

"Q. Mrs. Clemons, do you recall how the Petitioner was

dressed on the occasion of that trial?

A. No, I have a vague recollection of a gray or blue and white but I couldn't describe what he was wearing at all.

Q. Do you recall whether or not the way that he was dressed in any way affected your verdict?

A. No, it didn't affect me.

Q. I will ask you whether or not you were satisfied in your own mind based purely on the evidence that you heard from the witness stand that he was guilty?

A. Yes.

Q. And, in the occasion of fixing his punishment, did the manner in which he was dressed in any way affect the punishment that you gave him?

A. No." (S/F 5).

Juror Austin:

"Mr. Austin, do you now recall

how Mr. Scruggs was dressed at that trial?

A. Yes, sir, I do. He was dressed just as he is right now sir.

Q. The same type of blue coveralls that he's wearing now?

A. Yes, sir.

Q. Do you recognize that as being any particular type of attire?

A. Not necessarily so. It's a uniform-type coverall which is about all I can say about it.

Q. Do you recall any identifying marks that he had on his clothing at that time?

A. No, sir, I sure don't.

Q. In the course of your deliberations as a juror, I will ask you whether or not the manner in which he was dressed influenced your verdict?

A. No, sir. I can say definitely not because I was more or less interested in the facts

rather than on the appearance of him.

Q. All right, sir, and I will ask you whether or not that in any way influenced the amount of punishment that you gave him?

A. No, sir, it did not." (S/F 7, 8).

Juror Fenton:

"Q. Do you recall whether or not the manner in which he was dressed in any way affected your verdict?

A. I don't think the manner in which he was dressed would have influenced it very much. If it had of, it probably would have been in sympathy with the defendant." (S/F 11).

Petitioner's position is supported by the United States District Court for the Southern District of Texas which, (before the Fifth Circuit's decision in Hernandez v. Beto), held in Xanthull v. Beto, 307 F.Supp. 903 (S.D. Tex. 1970), that

"The tenuous possibility that the jury might have been influenced for or against defendant's guilt in this case by his jail clothing is too frail a reed to rely upon as a predicate for setting aside the state court conviction."

The court also held that a defendant's attire in jail clothing could have aroused the sympathy of the jury and thereby mitigated other overwhelming direct evidence of his guilt.

In Hall v. Cox, 324 F.Supp. 786 (W.D. Va. 1971), the court held that the fact that a defendant was tried in prison uniform was not so prejudicial as to deprive him of due process of law, and the Tenth Circuit has held that the nature of clothing worn by a defendant is not inherently prejudicial to his right to a fair and impartial trial. Anderson v. Watt, 475 F.2d 881 (10th Cir. 1973). In United States v. Williams, 498 F.2d 547 (10th Cir. 1974), a federal prisoner was displayed before the jury while wearing soiled jail clothing. Although the defendant declined an offer by the Deputy Marshal to change to his street clothes the United States District Judge held:

"It's the Court's judgment, however, that there has not been any substantial prejudice by reason of appearance for this much of the trial in the T-shirt and levi's."

Certainly being tried in jail clothes no more destroys the presumption of innocence than does the

reading to the jury of the indictment which states that the grand jurors, good and lawful men, upon their oath do swear that a defendant has committed some act that is against the peace and dignity of the State.

2. The Fifth Circuit's Holding That A Trial In Jail Clothes Denies A Defendant A Fair Trial Has Had And Will Continue To Have A Catastrophic Impact On The Administration Of Justice In Texas And In Other Jurisdictions.

The Fifth Circuit's unequivocal holding that trial in jail clothes infringes the fundamental right to the presumption of innocence has caused a flood of writs to be filed by prisoners tried or contending they were tried in their prison clothes. In the State of Texas alone, there have been eight cases considered by the Fifth Circuit on the jail clothes issue and nine more are in the process of being appealed. There are at present seventeen cases pending in the United States District Courts on the prison clothes question. These statistics do not include the jail clothes cases in the state courts of Texas and which will be in the federal courts upon the exhaustion of state court remedies.

The decision in the instant case holding that waiver of a jail clothes objection cannot be inferred from failure to object if trial in prison garb is customary in the jurisdiction will serve as a stimulus to all defendants to claim error by contending

they were tried in jail clothes. Any defendant who was tried in his prison clothes on either a primary conviction or a prior conviction used for enhancement will be entitled to a new trial under the holding of the Fifth Circuit, subject to the showing by the State of overwhelming evidence of guilt or an admission from a defendant's attorney that he allowed the defendant to be tried in jail clothes to invoke jury sympathy.

The impact of the Fifth Circuit's holding on the administration of justice makes this an appropriate case for this Court to grant certiorari and resolve.

3. This Court Should Grant Certiorari So As To Resolve The Conflict Now Existing Between Several Circuit Courts As To Whether Or Not The Trial Of A Defendant In Jail Clothing Is Inherently Prejudicial And Automatically Denies A Defendant His Right To A Fair Trial.

As mentioned above, the holding in the Fifth Circuit is that the trial of a defendant in prison clothing is inherently prejudicial and will lead to the reversal of a defendant's state court conviction unless the state can establish that all of the facts of the crime lead unerringly to guilt, or that trial counsel intended to use jail clothing as a tactic to gain sympathy with the jury. The Third Circuit appears to be in accord with this view. See Gaito v. Brierley, 485 F.2d 86 (3rd Cir. 1973), where the

court held that compelling a defendant to appear before a jury in prison clothing unconstitutionally infringes his due process right to be presumed innocent until proven guilty. However, at least one of the judges of that Circuit disagrees with the holding. Lemons v. United States, 489 F.2d 344, 347 (3rd Cir. 1974).

In conflict with these two Circuits is the holding of the Tenth Circuit and the Fourth Circuit. The Tenth Circuit in Watt v. Page, 452 F.2d 1174 (1972), cert. den. 405 U.S. 1070 (1972), expressly rejected the Fifth Circuit's holding in Hernandez v. Beto, and said at page 1176,

> "We do not hold that the nature of the clothing worn by the petitioner at his trial was inherently prejudicial of his right to a fair and impartial trial."

This case was sent back for further development of the facts, and on the second appeal the Tenth Circuit again reaffirmed their view that the clothing worn by a defendant at his trial is not inherently prejudicial to his right to a fair and impartial trial. See Anderson v. Watt, supra. The last writing to Petitioner's knowledge on this issue by the Tenth Circuit is found in United States v. Williams, supra. In that case the Tenth Circuit again said they expressly rejected the per se rule of the Fifth Circuit as set out in Hernandez v. Beto.

The Fourth Circuit is in accord with the Tenth Circuit and has stated that in the absence of

a showing of prejudice, a defendant is not denied a fair trial because he appeared before the jury in his prison uniform. See McFalls v. Peyton, 270 F.Supp. 577 (W.D. Va. 1967), aff'd 401 F.2d 890 (4th Cir. 1968), cert.den. 394 U.S. 951 (1969). To the same effect is Hall v. Cox, supra, where the court stated that the fact that a defendant was tried in prison uniform was not so prejudicial as to deprive him of due process of law. See also May v. Peyton, 268 F.Supp. 928 (W.D. Va. 1967), rev'd on other grounds, 398 F.2d 476 (4th Cir. 1968). The position of the Ninth Circuit on this question is not clear as the court held in Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972), that compelling the accused to wear prison clothing may deny to him the presumption of innocence. This Court should grant certiorari to settle the conflict now existing between the Circuits on this question.

CONCLUSION

For the above and foregoing reasons, the Petition for Certiorari should be granted. Petitioner prays that the holding below -- that trial in jail clothes destroys the presumption of innocence -- should be reversed.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

DUNKLIN SULLIVAN
Assistant Attorney General

Attorneys for Petitioner

P. O. Box 12548, Capitol Station
Austin, Texas 78711

PROOF OF SERVICE

I, Dunklin Sullivan, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served on Respondent by placing same in the United States Mail, certified, postage prepaid, addressed as follows: Mr. Ben L. Aderholt, Attorney at Law, 711 Fannin, Suite 1100, Houston, Texas 77002, on this the _____ day of November, 1974.

DUNKLIN SULLIVAN
Assistant Attorney General

APPENDIX "A"

Harry Lee WILLIAMS, Petitioner-Appellant,

v.

W. J. ESTELLE, Director, Texas Department of Corrections, and C. V. Kern, Sheriff, Respondents-Appellees.

No. 73–3854.

United States Court of Appeals,
Fifth Circuit.

Sept. 6, 1974.

State prisoner filed petition for writ of habeas corpus to secure his release from imprisonment under sentence for assault with intent to kill with malice aforethought. The United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., 364 F.Supp. 335, denied relief and the prisoner appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that prisoner did not waive his objection to being tried in prison garb even though he made no formal objection at trial; that decision that trial in prison garb is inherently unfair was applicable retroactively; and that error in trying prisoner in prison garb was not harmless.

Reversed and remanded.

1. Criminal Law ⇐660

To warrant inference that objection to trial in prison garb has been waived due to failure to object at trial, it must be shown that practice of trying prisoners in prison garb was not customary and might not have been insisted upon if objected to, or that accused hoped to elicit sympathy by his appearance in such clothing.

2. Criminal Law ⇐660

Accused who requested civilian clothing did not waive his objection to being tried in prison garb even though he made

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no formal objection to being tried in such clothing where practice of trying prisoners in such clothing was customary in jurisdiction in which he was tried and there was no evidence that his counsel used his appearance to evoke sympathy from the jury.

3. Courts ⇐100(1)

If new rule announced by court serves broad social policy, such as deterrence of unconstitutional actions by law enforcement officials, courts are reluctant to invoke the rule retroactively; however, rules designed to enhance reliability of determinations of guilt or innocence are usually applied retroactively.

4. Courts ⇐100(1)

"Certainty and frequency" of prejudice which new rule announced by court is designed to eliminate are important determinants of the appropriateness of applying the new rule retroactively.

5. Criminal Law ⇐633(1)

Whether a practice is prejudicial to rights of an accused must be determined in light of both the accused's interest in an accurate determination of guilt or innocence and the state's interest in an efficient criminal justice system unburdened by excessive delay or complication.

6. Courts ⇐100(1)

Decision that trial in prison garb is inherently unfair and denies due process was applicable retroactively.

7. Habeas Corpus ⇐85.2(1)

Petitioner who seeks writ of habeas corpus on ground that trial in prison garb has denied him due process has burden of proving that the alleged error has actually occurred.

8. Criminal Law ⇐1166.11

Error in trying accused in prison garb is harmless if guilty verdict is supported by overwhelming evidence.

9. Habeas Corpus ⇐25.1(3)

Error in trying accused, who was charged with assault with intent to kill with malice aforethought, in prison garb was not harmless where evidence of malice aforethought and of intent to kill was not overwhelming.

Appeal from the United States District Court for the Southern District of Texas.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

Petitioner Harry Lee Williams appeals from denial of habeas corpus by the district court. He was convicted of assault with intent to kill with malice aforethought in a Texas state court in November 1970. The principal contention in this proceeding is that petitioner's right to due process of law was violated when he was compelled to wear a prison uniform [1] at his jury trial,[2] despite his request for his readily available civilian clothes. We reverse and remand for a new trial.

1. The Due Process Implications of Trial in Prison Garb

In Brooks v. Texas, 5 Cir., 1967, 381 F.2d 619, 624, this Court characterized trial in prison garb as "inherently unfair." Four years later, in Hernandez v. Beto, 5 Cir., 1971, 443 F.2d 634, we reaffirmed this language in *Brooks* and held the practice to be constitutional error—an impingement upon the presumption of innocence.[3] We added, however, that "[a]

1. It is undisputed that Williams' clothing was immediately recognizable as prison garb. *Cf.* United States v. Whitaker, 10 Cir., 1970, 435 F.2d 1300; Klinger v. Erickson, D.S.D., 1971, 328 F.Supp. 674.

2. *Cf.* United States v. Social Services Dep't, E.D.Pa., 1967, 263 F.Supp. 971, 975 (bench trial in prison garb held nonprejudicial).

3. Three other circuits have passed on this question. The Tenth Circuit has held that trial in prison garb is not *inherently* prejudicial, but has overturned one conviction because of the taint created by the practice. Anderson v. Watt, 10 Cir., 1973, 475 F.2d 881. *Cf.*

defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." 443 F.2d at 637.

[1, 2] Waiver of the objection cannot be inferred merely from failure to object if trial in prison garb is customary in the jurisdiction. It must be shown that the practice was not customary and might not be insisted upon if objected to, or that the defendant hoped to elicit sympathy by his appearance in such clothing. *See* Hernandez v. Beto, *supra*, 443 F.2d at 636–637; Hollins v. Beto, 5 Cir. 1972, 467 F.2d 951, 952; Goodspeed v. Beto, 5 Cir., 1972, 460 F.2d 398, 400. In the present case, as in *Hernandez*, the practice was customary, and there was no evidence that counsel used Williams' appearance to evoke sympathy from the jury. Therefore, the district court correctly found there was no waiver, though no formal objection to prison garb was made by Williams' counsel at trial. 364 F.Supp. at 343.

II. Retroactive Application of *Hernandez*

Williams' trial occurred before our decision in *Hernandez*, and so we must determine whether *Hernandez* is to be applied retroactively.[4] In recent years the courts have abandoned the traditional practice of automatically giving retroactive effect

Watt v. Page, 10 Cir., 1972, 452 F.2d 1174; McFalls v. Peyton, W.D.Va., 1967, 270 F.Supp. 577. The Ninth and Third Circuits have followed *Hernandez*. Bentley v. Crist, 9th Cir., 1972, 469 F.2d 854; Gaito v. Brierley, 3 Cir., 1973, 485 F.2d 86. A number of state courts have also found trial in prison garb to be constitutional error. Commonwealth v. Keeler, 216 Pa.Super. 193, 264 A.2d 407 (1970); Miller v. State, 249 Ark. 3, 457 S.W.2d 848 (1970); People v. Shaw, 381 Mich. 467, 164 N.W.2d 7 (1969); People v. Zapata, 220 Cal. App.2d 903, 34 Cal.Rptr. 171 (1963); Eaddy v. People, 115 Colo. 488, 174 P.2d 717 (1946); Collins v. State, 70 Okl.Cr. 340, 106 P.2d 273 (1940); Shultz v. State, 131 Fla. 757, 179 So. 764 (1934).

4. We find no discussion in any decision on the question whether this rule should be applied retroactively. Both the Ninth and Third Circuits, however, have given the rule retroactive effect, Bentley v. Crist, *supra*; Gaito v. Brierley, *supra*, by announcing it in a habeas appeal. *See* Jackson v. Denno, *infra*; Stovall v. Denno, *infra*, 388 U.S. at 298, 87 S.Ct. at 1970. A district court in the Fifth Circuit has also applied the rule retroactively via habeas corpus. Dennis v. Dees, E.D.La., 1968, 278 F.Supp. 354.

to judicial decisions. *See* Norton v. County of Shelby, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886). In Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the Supreme Court consulted three criteria in holding that Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (applying the Fourth Amendment exclusionary rule to the states) was not to apply retroactively: (1) the purpose of the newly announced rule; (2) the extent of reliance on the old rule by law enforcement officials; and (3) the probable effect of retroactive application on the administration of justice. *See also* Pruett v. State of Texas, 5 Cir. 1973, 470 F.2d 1182, 1184.

[3] If a new rule serves a broad social policy—such as deterrence of unconstitutional actions by law enforcement officials—the courts have been reluctant to invoke retroactivity. *See* Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971); Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969); Tehan v. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); Linkletter v. Walker, *supra*; Mackey v. United States, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971); Fuller v. Alaska, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968); Lyon v. United States, 5 Cir., 1969, 416 F.2d 91; Monroe v. United States, 5 Cir., 1970, 435 F.2d 160. On the other hand, rules designed to enhance the reliability of determinations of guilt or innocence are usually applied retroactively. *See* Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Eskridge v. Washington State Prison Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958); Arsenault v. Massachusetts, 393 U.S. 5, 89 S.Ct. 35, 21 L.Ed.2d 5 (1968); McConnell v. Rhay, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968); Smith v. State of Texas, 5 Cir., 1968, 395 F.2d 958.

[4] This criterion is not an automatic guide to whether retroactivity is justified. "[T]he question whether a constitutional rule of criminal procedure does or does not enhance the

reliability of the fact-finding process at trial is necessarily a matter of degree." Johnson v. New Jersey, 384 U.S. 719, 729, 86 S.Ct. 1772, 1778, 16 L.Ed.2d 882 (1966); Adams v. Illinois, 405 U.S. 278, 281, 92 S.Ct. 916, 918, 31 L.Ed.2d 202 (1972); Gosa v. Mayden, 413 U.S. 665, 680, 93 S.Ct. 2926, 2936, 37 L.Ed.2d 873 (1973); Michigan v. Payne, 412 U.S. 47, 55, 93 S.Ct. 1966, 1970, 36 L.Ed.2d 736 (1973); Bassett v. Smith, 5 Cir., 1972, 464 F.2d 347, 349. The "certainty and frequency" of the prejudice the new rule is designed to eliminate are important determinants of the appropriateness of retroactivity. Stovall v. Denno, 388 U.S. 293, 299, 87 S.Ct. 1967, 1971, 18 L.Ed.2d 1199 (1967); Juelich v. United States, 5 Cir., 1968, 403 F.2d 523. *See* DeStefano v. Woods, 392 U.S. 631, 634, 88 S.Ct. 2093, 2095, 20 L.Ed.2d 1308 (1968).

In the present case, the purpose of the new rule unquestionably is to enhance the reliability of the fact-finding process. Nothing could be more subversive of that process than a practice that compromises the presumption of innocence. Nor need we speculate about the certainty and frequency of the prejudice associated with this error.

[5] In Brooks v. Texas, *supra*, we declared trial in prison garb to be "inherently unfair." This conclusion is consistent with the view that whether a practice is, in a legal sense, prejudicial must be determined in light of both the individual's interest in an accurate determination of guilt or innocence and the state's interest in an efficient criminal justice system unburdened by excessive delay or complication.

For example, physical restraints on a defendant are permissible only when necessary to prevent injury to bystanders, escape, or disorder at trial. Odell v. Hudspeth, 10 Cir., 1951, 189 F.2d 300, 302. Like trial in prison garb, this practice adversely affects the accuracy of the fact-finding process, because it may prejudice the jury against the defendant. Odell v. Hudspeth, *supra*, 189 F.2d at 302. The use of restraints is not "inherently unfair," however, because the adverse effect may be an unavoidable consequence of protecting

an important state interest—such as safety in the courtroom. Therefore, the defendant must show that the practice was prejudicial in his case—that is, was not necessary to protect an important state interest. *See* Gregory v. United States, 8 Cir., 1966, 365 F.2d 203, 205; Way v. United States, 10 Cir., 1960, 285 F.2d 253, 254; Hardin v. Estelle, W.D.Tex., 1973, 365 F.Supp. 39, 46–47. *See generally* Lane v. Warden, 4 Cir., 1963, 320 F.2d 179, 186.

[6] Trial in prison garb, in contrast to use of physical restraints, does not serve a legitimate state interest. The state has advanced no reason for denying a defendant's request for his available civilian clothes. The certainty and frequency of the prejudice need not be measured. The practice in question is also prejudicial because it is unnecessary.[5] Thus the purpose of the rule announced in *Hernandez* strongly supports retroactivity.

The second factor—the extent of reliance by law enforcement officials—also points toward retroactivity. In almost every case in which the Supreme Court has refused to apply constitutional rules of criminal procedure retroactively, the new rule was announced in a case overruling clear, well-established precedent. *See* Williams v. United States, *supra*, 401 U.S. at 648, 91 S.Ct. at 1150; Desist v. United States, *supra*, 394 U.S. at 250, 89 S.Ct. at 1034; DeStefano v. Woods, *supra*, 392 U.S. at 634, 88 S.Ct. at 2095; Stovall v. Denno, *supra*, 388 U.S. at 299, 87 S.Ct. at 1971; Johnson v. New Jersey, *supra*, 384 U.S. at 731, 86 S.Ct. at 1780; Tehan v. Shott, *supra*, 382 U.S. at 411, 86 S.Ct. at 462; Linkletter v. Walker, *supra*, 381 U.S. at 630, 85 S.Ct. at 1738; Pruett v. State of Texas, *supra*, 470 F.2d at 1184. The Court has never refused retroactive application where the condemned practice had not received at least substantial support from prior rulings. *See* Adams v.

5. In this case, as in *Hernandez*, the defendant was presented in prison clothes because he failed to post bond. A different result may be appropriate where the defendant is on trial for an offense allegedly committed while he was in prison, because the jury would learn of his incarceration in any event.

Illinois, 405 U.S. 278, 283–284, 92 S.Ct. 916, 920, 31 L.Ed.2d 202 (1972); Gosa v. Mayden, 413 U.S. 665, 682, 93 S.Ct. 2926, 2932, 37 L.Ed.2d 873 (1973) (plurality opinion); Michigan v. Payne, 412 U.S. 47, 56, 93 S.Ct. 1966, 1971, 36 L.Ed.2d 736 (1973). Reliance on a blank slate is not enough. *But see* Bassett v. Smith, 5 Cir., 1972, 464 F.2d 347, 351. Even where the condemned practice has found support in lower court decisions or Supreme Court dicta, new rules have been applied retroactively if their effect on trial accuracy is substantial and they do not greatly burden the administration of justice. *See* Witherspoon v. Illinois, *supra*, 391 U.S. at 523 n. 22, 88 S.Ct. at 1777; Roberts v. Russell, 392 U.S. 293, 295, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100 (1968). *See generally* Robinson v. Neil, 409 U.S. 505, 510, 93 S.Ct. 876, 879, 35 L.Ed.2d 29 (1973).

Addressing the question of retroactivity in a more general context, the Supreme Court has concluded that to be applied prospectively only, a decision must "establish a new principle of law either by overruling clear past precedent on which litigants may have relied . . . [citations omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." [Citations omitted.] Chevron Oil Co. v. Huson, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). Even by this stricter standard, the case for retroactivity is strong. *Hernandez* overruled no precedents—clear or otherwise—and was unmistakably foreshadowed in Brooks v. Texas, *supra*. *See* Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969).

[7, 8] The third factor, the effect retroactivity might have on the administration of justice, was ably analyzed by the district court. Each case of trial in prison garb is to be evaluated on its own facts, Hollins v. Beto, *supra*, 467 F.2d at 952,[6] and in habeas proceedings the petitioner bears the bur-

6. Since *Hernandez*, the district courts have not been hesitant to deny habeas petitions based on trial in prison garb where the evidence of guilt satisfied the harmless error test. *See, e. g.* Bates v. Estelle, S.D.Tex., 1973, 360 F.Supp. 1278.

den of proving the error occurred. Swain v. Alabama, 380 U.S. 202, 226–227, 85 S.Ct. 824, 839–840, 13 L.Ed.2d 759 (1965); Richardson v. State of Texas, 5 Cir., 1970, 425 F.2d 1372, 1373; Scott v. Walker, 5 Cir., 1966, 358 F.2d 561, 571. The number of new trials made necessary by the new rule must also be evaluated in light of the standard by which the error of presenting a defendant in prison garb is to be reviewed, as announced in Hernandez v. Beto, *supra*:

> Before "a federal constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt." [quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)].

Such a belief is warranted if the reviewing court finds overwhelming evidence in support of the verdict. Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728–1729, 23 L.Ed.2d 284 (1969).

III. Whether the Error Was Harmless

[9] The jury could have found petitioner (1) not guilty, (2) guilty of assault with intent to kill with malice aforethought, or (3) guilty of assault with intent to kill without malice. We find the evidence of malice aforethought and of intent to kill insufficient to sustain the conviction under the standard promulgated in *Chapman* and *Harrington*, *supra*.

The record shows that petitioner Williams went to an apartment owned by his former landlord, Ray Neatherlin, intending to visit Kay Tolley, a tenant he had known there. The occupants of a neighboring apartment told Williams that Tolley was at Neatherlin's apartment, and he said he would wait with them for her to return. The circumstances of his arrival thus do not suggest any malice or intent to kill on petitioner's part at that point. Indeed, he appears to have tried to avoid any confrontation with Neatherlin by not going to his apartment.

The only evidence of any hostility between Williams and Neatherlin was the unelaborated hearsay statement of Kay Tolley, testified to by Neatherlin, that Williams had come there to cause trouble.

Neatherlin accompanied Kay Tolley to her apartment after asking Bill Stacy, a friend living in the neighboring apartment, to come along. Stacy picked up a pistol and joined the other two. When the three arrived, Williams, who had been chatting with the neighbors on their front porch, approached them. He said hello to Kay Tolley, and Neatherlin demanded compensation for some bad checks allegedly tendered as payment of rent Williams allegedly owed from his prior tenancy. Williams stated he owed nothing, and Neatherlin then demanded he pay the cost of cleaning up the apartment he had occupied, which Neatherlin claimed had been filthy. Williams refused, and Neatherlin ordered him off the property at once.

At this point there was no indication that Williams was about to participate in an affray. One witness testified he looked angry, and there was some indication he approached Tolley and Neatherlin with his hand cupped, perhaps as if holding a knife. No one saw the knife, however, until the very end of the fight. Therefore, if malice and intent to kill are to be inferred, they can be inferred only from the circumstances of the fight.

Williams faced a heavier opponent who was accompanied by an armed ally. Although Stacy testified the pistol was stuck in the back of his trousers, Williams testified at the federal habeas hearing that it was in Stacy's front pocket and clearly visible to him. The fight itself lasted about three minutes. Neither man pressed an advantage. Each time Williams was knocked down, Neatherlin, who never left his feet during the fight, waited for him to get back up. At trial Neatherlin referred to the incident as a "little run-in."

Several plausible theories may explain Williams' assault on Neatherlin: fear that Neatherlin and Stacy would resort to physical force to collect Neatherlin's debt claim; anger at

being accused of passing bad checks (Williams was not the maker of the checks) and accused of being filthy, and at being ordered to leave, embarrassed before his friends. However, a malicious intent to kill is also a plausible explanation for the assault—perhaps even the most plausible one. The evidence for that explanation is not so overwhelming that we can hold harmless the error of trying Williams in prison garb.

Another source of evidence of malice and intent to kill is the extent of Neatherlin's injuries. The principal testimony on this question was Neatherlin's self-serving statements and a remark by the arresting officer, who arrived on the scene a few minutes after the fight ended and testified that Neatherlin had "several lacerations." No medical records or physicians' reports were introduced. Neatherlin himself claimed he had received a stab wound in the chest as deep as the length of the knife blade itself (several inches), several foot-long gashes, and a stomach wound so serious that his intestines were hanging out. Yet he admitted he did not even know he had been cut until Stacy yelled that Williams had a knife and stepped in to stop the fight.

Our view of the evidence bears comparison with the facts in Hernandez v. Beto, *supra*. In that case the pivotal question was whether the defendant was intoxicated. Although three policemen, three children, and an adult testified that they could smell alcohol on the defendant, that he staggered, and that his eyes were blurred and misty, the Court concluded the evidence was insufficient to render harmless the error of trying the defendant in prison garb. *Cf.* Thomas v. Beto, 5 Cir., 1973, 474 F.2d 981, 983, with Smith v. Estelle, 5 Cir., 1974, — F.2d —. The evidence in this case is not so strong as to warrant the conclusion that the constitutional error of trying Williams in prison garb was harmless.

The cause is remanded with directions to grant the writ of habeas corpus and to discharge petitioner, unless the State elects to retry him within a reasonable time.

Reversed and remanded.

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APPENDIX "B"

Harry Lee WILLIAMS, Petitioner,

v.

Dr. George J. BETO, Director, Texas Department of Corrections, Respondent

Civ. A. No. 72-H-432

United States District Court,
S. D. Texas,
Houston Division.
Oct. 2, 1973

Petition by state prisoner for habeas corpus. The District Court, Carl O. Bue, Jr., J., held that the trial of a prisoner in jail clothing is inherently prejudicial, that Fifth Circuit case of Hernandez v. Beto would have retroactive effect and that the trial of the prisoner in jail clothing was harmless error in view of the strong evidence of guilt of assault to murder with malice and the lack of factual basis which could bring the prisoner within range of the lesser included offense of assault without malice.

Petition denied.

1. Habeas Corpus - 85.5(11)

Evidence adduced in state prisoner's habeas corpus proceeding established that there was no ineffective assistance of counsel at prisoner's state trial.

2. Criminal Law - 633(1)

It is inherently unfair in a jury trial to try a criminal defendant who is dressed in jail or pri-

son clothing, as such action infringes upon the fundamental right of the presumption of innocence.

3. Criminal Law - 633(1)

Where defendant is on trial for a prison offense against a fellow inmate in an environment where prison clothing is the normal attire, there is no prejudice for the jury to see that which is already known and defendant may be tried in prison clothing.

4. Habeas Corpus - 25.1(4)

The fact that a defendant is tried in jail clothing for nonprison offense does not, standing alone, compel a new trial; if trial counsel intended to use jail clothing as a tactic to gain sympathy with the jury, no reversal is warranted.

5. Criminal Law - 660

A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error.

6. Criminal Law - 660

Mere fact that no objection to being tried in jail clothing was raised does not compel, or permit, termination of judicial inquiry into the claimed harm.

7. Criminal Law - 660

In the absence of showing in the record of express waiver or showing that trial counsel willingly intended to extract some tactical benefit by

having the defendant tried in jail clothes, there must be judicial determination as to whether there was voluntary waiver of the right, even if the defendant failed to object.

8. Criminal Law - 660

A judicial determination as to whether there was voluntary waiver of right not to be tried in prison or jail clothing must be based on reading of the record and on what seems to have been the probable impact of the prison clothing upon the mind of an average jury.

9. Criminal Law - 1162

Before constitutional error can be held to be harmless, the court must be able to conclude that such error was harmless beyond reasonable doubt.

10. Criminal Law - 1162

If all of the facts lead unerringly to guilt, and no possible inference clouds or conflicts with any essential or material fact, then an error is harmless beyond reasonable doubt.

11. Criminal Law - 1186.1

If the jury could have believed by even "bare possibility" facts favorable to the defendant that are inconsistent with their verdict, or if the verdict carries a seed of reasonable doubt as to harm, then it is the duty of the reviewing court to reverse the conviction.

12. Courts - 100(1)

Primary criteria to be considered in determining whether to apply a particular rule retroactively are the purpose to be served by the new standard, the extent of the reliance by law enforcement authority upon old standards and the effect on the administration of justice of retroactive application of new standard.

13. Courts - 100(1)

The rule of the Fifth Circuit case of Hernandez v. Beto which found it inherently unfair for a criminal defendant to be tried in jail clothing would be given retroactive application.

14. Habeas Corpus - 25.1(4)

The fact that a defendant was tried in jail clothes does not per se automatically compel the granting of immediate relief following a habeas corpus hearing but does require judicial scrutiny to insure that the petitioner's criminal trial contains no constitutional deprivations.

15. Criminal Law - 660

In view of common practice in Harris County, Texas, of trying defendants in jail clothes, fact that defendant might have asked deputy sheriff to be tried in civilian clothing, and, upon denial, thereafter failed to raise the matter with counsel or the trial court did not constitute a waiver of right to be tried in civilian clothing.

16. Habeas Corpus - 25.1(4)

In view of strong evidence in state trial which resulted in conviction of assault to murder with malice and lack of evidence that would bring defendant within the lesser offense of assault without malice, the trial of the state prisoner in jail clothes was harmless error. Vernon's Ann. Tex.P.C. art. 1160.

Ben L. Aderholt, Houston, Tex., for petitioner.

John L. Hill, Atty. Gen. of Texas, Joe B. Dibrell, E. Bruce Curry, Asst. Attys. Gen., Austin, Tex., for respondent.

MEMORANDUM AND OPINION

CARL O. BUE, Jr., District Judge.

This petition for a writ of habeas corpus is one of two applications before this Court based upon the same legal issue: the effect of a trial in jail clothing upon a conviction. Consecutive evidentiary hearings were held in this and in a companion case, Dennison v. Beto, Civil Action No. 70-H-702. Both petitions stem from criminal trials conducted in Harris County, Texas, and involve consideration of the alleged local practice of trying certain defendants in jail clothing.

THE FACTUAL BACKGROUND

Petitioner Williams was tried in the 177th District Court of Harris County, Texas, in November, 1970, for assault to murder in connection with

a knifing incident in which he inflicted severe wounds on his ex-landlord. The petitioner was convicted by a jury of assault to murder with malice; he was sentenced to ten years by the Honorable Miron A. Love, confinement to be not less than two years nor more than ten. The conviction was affirmed in a written opinion on appeal. Williams v. State, 477 S.W.2d 24 (Tex.Cr.App. 1972). The specific issues before this Court, ineffective assistance of counsel at the state trial and trial in jail clothes, were decided adversely to petitioner on direct appeal. For reasons outlined hereafter, it is important to comprehend the gravity of the circumstances surrounding the offense as extracted primarily from the transcript of the state trial.

On May 29, 1970, a fight took place between the petitioner and one Ray Neatherlin, the landlord of an apartment complex on East 7th Street in Houston, Texas. The petitioner had previously been a resident of this complex and had been asked to move out as a consequence of some unspecified difficulty. (Transcript at 142). At the time of the incident at issue, the landlord was 58 years old (Tr. 129) and weighed approximately 200 to 215 pounds (Tr. 125). The petitioner was approximately 64 years of age (Tr. 237) and was characterized by defense counsel as being of "frail body" (Tr. 17). A witness to the incident stated that the landlord was larger, more robust and physically stronger than the petitioner (Tr. 194). The landlord was not called as a witness before this Court at the petitioner's evidentiary hearing, but both men were present before the jury at the state trial.

The petitioner had gone to the apartment complex to visit a Mrs. Kay Tolley who was a wit-

ness to the fight. She did not testify at the trial, as she had moved out of state. Neighbors and subsequent trial witnesses were sitting outside of their apartments nearby, and they advised the petitioner that Mrs. Tolley was at the landlord's apartment. The petitioner awaited her return with the neighbors. The landlord testified that Mrs. Tolley was at his apartment to pay her rent and that she had told him the petitioner had returned to cause trouble (Tr. 200). The landlord promptly left his apartment to speak to the petitioner and also to inquire about certain allegedly bad checks used by petitioner to pay his rent while still living there (Tr. 113-14).

As the landlord left his apartment, he called to a neighbor, Bill Stacy, to accompany him (Tr. 133). The tone in the landlord's voice was evidently such that Stacy, expecting trouble, grabbed his pistol and stuck it in the back of his trousers as he hurried to accompany the landlord (Tr. 140-41). Mrs. Tolley and the two men reached the petitioner at about the same time (Tr. 170), Stacy testifying that he was only about a step behind the landlord (Tr. 149). The petitioner was described as appearing nervous upon seeing the landlord, and he put his hand into his right pocket and fumbled around a bit (Tr. 170-71, 185). He stepped forward to meet the landlord, his hand reportedly "cupped" (Tr. 171). The landlord characterized the petitioner's attitude as being belligerent (Tr. 117).

Words were exchanged over the checks with the petitioner denying that he owed anything (Tr. 115-16). The landlord then asked petitioner to leave (Tr. 116). Stacy testified that he quickly realized that a man-to-man confrontation was about to take place, so he assumed the role of ensuring that no one else

interfered (Tr. 149, 152). The fight began when the petitioner jumped or first moved toward the landlord, striking or pushing at his neck (Tr. 117, 143, 172, 186) and continued for several minutes (Tr. 150, 174, 189) with considerable pushing, scuffling and hitting taking place (Tr. 150, 177, 190). Although the petitioner was apparently knocked down by the landlord several times, he only received a few marks and scratches (Tr. 161) and exhibited no signs of facial swelling according to the arresting police officer (Tr. 195-99). The petitioner repeatedly got up and hit the landlord (Tr. 176, 179). The landlord stated that the petitioner repeatedly tried to get in close and clinch with him (Tr. 92); Stacy stated much the same thing (Tr. 144). Only after the fight had continued for a period of time did Stacy realize that the petitioner had a knife. Stacy then pulled his gun on the petitioner, yelled a warning to the landlord (Tr. 146) and stopped the fight. At the trial witnesses testified the petitioner had been fighting with his hand cupped (Tr. 171, 186), and Stacy characterized the petitioner as appearing to be an experienced knife fighter (Tr. 144-45).

The landlord was badly cut. His testimony (Tr. 117, 119-22, 132) and that of Stacy (Tr. 146) indicate that the landlord had been cut in the throat, stabbed in the chest, cut three times over the heart and once in the stomach causing his intestines to hang out. He was taken to a hospital where he received a total of 58 stitches, his condition being listed as "critical" (Tr. 120).

THE EVIDENTIARY HEARING

At the habeas corpus evidentiary hearing held in this Court, counsel for petitioner offered

evidence in affidavit form from the Clerk of the 177th District Court that during the months of October and November, 1970, there were a total of six "jail cases", i.e., defendants not released on bond, tried before juries in Judge Miron A. Love's court of which petitioner's case was one. Counsel for petitioner also introduced depositions upon written questions taken in compliance with Fed.R.Civ.P. 31 wherein counsel for each of the five remaining "jail cases" testified that to the best of their knowledge their clients had been tried in jail clothes.

Counsel for respondent introduced several exhibits, including an affidavit from the Honorable Miron A. Love which in pertinent part recited:

> I have been asked about my policy in regard to defendants who were tried in jail clothing. I can state unequivocably that if at any time a defendant or his attorney made known to me either before or during the trial that he did not wish to be tried in jail clothing, I would have granted his request, and permitted him time to obtain civilian clothing to wear at his trial.
>
> . . . on numerous occasions I have granted requests by defendants or their attorneys for them to be allowed to obtain civilian clothes to wear at their trials. I have never compelled a defendant to go to trial in jail clothes, and on every occasion when a defendant or his attorney requested that he be allowed to wear civilian clothes at his trial I have granted the request.

Recognition of this policy was acknowledged by

James Skelton, the district attorney who prosecuted petitioner at his state trial and who was a witness at this Court's evidentiary hearing. To the same effect was an affidavit obtained from one of the defense attorneys questioned by petitioner's counsel which was introduced into evidence.

Mr. Chester Darnell, defense counsel for petitioner at the state trial, testified at the evidentiary hearing that to his knowledge and belief all non-bailed defendants were tried in jail garb at that time. He testified that he never raised an objection to trial in jail clothes because a similar objection had been denied by the Honorable Wendell Odom, then a state district judge in Harris County, and counsel felt that such an objection before Judge Love would be denied as well. Counsel was unaware of Judge Love's practice as set forth above. The petitioner testified before this Court that he explicitly asked one Captain Cleveland, a Deputy Sheriff, to permit him to change clothes before his state trial, but the request was denied. He did not thereafter raise the issue with attorney Darnell or before Judge Love.

Attorney Darnell's general trial strategy in the state trial had been to try to raise the issue of self defense, but he had been unsuccessful because the petitioner would not take the stand. Darnell had conferred with the petitioner on several occasions prior to trial and had reviewed the case and evidence with the prosecutor. He had apprised the petitioner of the difficulties in the case and the progress of the trial, but the petitioner had continued to refuse to testify.

Former District Attorney Skelton testified

at the evidentiary hearing that, as an experienced criminal lawyer, he would have kept the petitioner off the stand. He characterized the evidence in the case against the petitioner as highly favorable for the prosecution. He also testified that following the state trial he had ascertained that the jury was affected primarily by three factors: (1) the severity of the injuries inflicted upon the landlord; (2) the fact that the petitioner had wielded the knife like an experienced knife fighter; and (3) the fact that the victim was the landlord seeking to remove the petitioner from his own premises.

THE LEGAL ISSUES

INEFFECTIVE ASSISTANCE OF COUNSEL

(1) While the issue of ineffective assistance of counsel is present in this case, it is not relied upon heavily by petitioner. Nor should it be. This Court has reviewed the record in its entirety, and it is apparent that defense counsel in the state criminal trial rendered reasonably effective legal representation. Any reliance upon studied hindsight to discern possible alternatives in trial strategy can only be viewed as counter productive, particularly in the light of the assessment of the case rendered by the district attorney handling the prosecution. This Court is persuaded that there was no ineffective assistance of counsel.

THE EFFECT OF PETITIONER'S TRIAL IN JAIL CLOTHES ON THE PRESUMPTION OF INNOCENCE

This issue is not so readily resolved. Indeed, the effect on a defendant's presumption of

innocence when tried in jail or prison clothes does not appear to have been extensively litigated in the state courts outside of Texas. See, e. g., 21 Am.Jur. 2d Criminal Law Sec. 239 (1965). A thorough review of federal cases suggests that the issue has been considered only occasionally outside of the Fifth Circuit in general and the federal district courts in Texas in particular. See, e. g., Watt v. Page, 452 F.2d 1174 (10th Cir. 1972), cert. denied, 405 U.S. 1070, 92 S.Ct. 1520, 31 L.Ed.2d 803; Moye v. State of Georgia, 330 F.Supp. 290 (N.D.Ga. 1971); Hall v. Cox, 324 F.Supp. 786 (W.D.Va. 1971); McFalls v. Peyton, 270 F.Supp 577 (W.D.Va. 1967), aff'd, 401 F.2d 890 (4th Cir.); United States v. Social Service Dept., 263 F.Supp 971 (ED.Pa. 1967).

THE FIFTH CIRCUIT CASES

To date the Fifth Circuit Court of Appeals appears to have considered this issue in one form or another on eight occasions. In order of release, the opinions are as follows: Brooks v. State, 381 F.2d 619 (5th Cir. 1967); Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971), cert. denied, 404 U.S. 897, 92 S.Ct. 201, 30 L.Ed.2d 174; Garcia v. Beto, 452 F.2d 655 (5th Cir. 1972); United States v. Fideler, 457 F.2d 921 (5th Cir. 1972); Goodspeed v. Beto, 460 F.2d 398 (5th Cir. 1972); Hollins v. Beto, 467 F.2d 951 (5th Cir. 1972); United States ex rel. Stahl v. Henderson, 472 F.2d 556 (5th Cir. 1973); Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973).

(2) In this Circuit it has been held that it is inherently unfair to try a criminal defendant who is dressed in jail or prison clothing, as such action infringes upon the fundamental right of the presumption of innocence. Hernandez v. Beto, supra, 443

F.2d at 636-637; Brooks v. State, supra, 381 F.2d at 624. It, is the trial in such clothing before a jury which is improper, since the possibility exists that such attire subtly and subconsciously can influence their deliberations. As the Court in Brooks emphasized:

> No insinuations, indications or implications suggesting guilt should be displayed before the jury, other than admissible evidence and permissible argument.

381 F.2d at 624. Along the same lines a Pennsylvania district court has stated that:

> . . . the critical element appears to be display of the defendant before the jury in a fashion that will allow them to be swayed by his appearance as an already convicted criminal.

United States v. Social Service Dept., 263 F.Supp. 971 (E.D.Pa. 1967).

(3) It is not the wearing of civilian clothing in which the defendant may have been incarcerated, or the fact that the defendant at his trial was not dressed in coat and tie before the jury as were other trial participants which constitutes possible prejudice. United States v. Fideler, supra, 457 F.2d at 922; Moye v. Georgia, supra, 330 F.Supp. at 292. Indeed, under some circumstances trial in prison clothing is not inherently prejudicial. For example, when a defendant is on trial for a prison offense against a fellow inmate in an environment where such clothing is the normal attire, there is no prejudice for the jury to see that which is already

known. United States ex rel. Stahl, supra, 472 F.2d at 557.

(4-7) The fact that a defendant is tried in jail clothing for a non-prison offense does not, standing alone, compel a new trial. Garcia v. Beto, supra, 452 F.2d at 655. If trial counsel intended to use jail clothing as a tactic to gain sympathy with the jury, no reversal is warranted. Id. at 656. As the Fifth Circuit Court of Appeals has noted, "(a) defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." Hernandez v. Beto, supra, 443 F.2d at 634 (on petition for rehearing) (emphasis added). The reason for this rule has been definitively stated by the Tenth Circuit Court of Appeals:

> In several of the cited cases reference is made to the possibility that the attorney and the defendant there concerned may have wanted the accused tried in jail uniform on some theory that this would be to the advantage of the accused . . . . This matter of possible trial strategy is a factor which should be considered by the trial court . . . because the petitioner, of course, cannot deliberately create a condition for an expected advantage and, failing that, urge it as error. A deliberate purpose to be so tried may be found from the failure to object to trial in jail clothing unless the trial court is persuaded that the lack of objection resulted from circumstances that unfairly caused the defendant to forego an objection or to request to be tried in other clothing. These must be circumstances which were not a part of trial strategy.

Watt v. Page, 452 F.2d 1174, 1176-1177 (10th Cir. 1972), cert. denied, 405 U.S. 1070, 92 S.Ct. 1520, 31 L.Ed.2d 803. However, the mere fact that no objection was raised does not compel, or permit, termination of judicial inquiry into the claimed harm. In both Brooks and Hernandez, for example, no objections were made by counsel. In the absence of a showing in the record of express waiver or a showing that trial counsel "willingly" intended to extract some tactical benefit by having the defendant tried in jail clothes, there must be a judicial determination as to whether or not there was a voluntary waiver of the right, even if the defendant failed to object. Hollins v. Beto, supra, 467 F.2d at 952; Goodspeed v. Beto, supra, 460 F.2d at 400.

(8-11) A judicial determination must be based on a reading of the record and on what seems to have been the probable impact of the prison clothing upon the minds of an average jury. Before a constitutional error can be held to be harmless, the court must be able to conclude that such error was harmless beyond a reasonable doubt. Hernandez v. Beto, supra, 443 F.2d at 637. See also Noble v. Beto, 325 F.Supp. 607, 608 (S.D.Tex. 1971) ("evidence of guilt . . . is so strong that the error thus committed is harmless."); Bates v. Estelle, 360 F. Supp. 1278, 1281 (S.D.Tex. 1973) ("the probable impact (on the jury) . . . was harmless beyond a reasonable doubt.") If all of the facts lead unerringly to guilt, and no possible inference clouds or conflicts with any essential or material fact, then the error is harmless beyond a reasonable doubt. Thomas v. Beto, supra, 474 F.2d at 983. To paraphrase Thomas, if the jury "could have believed" by even a "bare possibility" facts favorable to the defendant that are inconsistent with their verdict, or if the

verdict carries a "seed of reasonable doubt as to harm", then it is the duty of the reviewing court to reverse the conviction. Id. at 983.

THE TEXAS CASES

This Court has reviewed as well the published opinions of the Texas courts. In general, these courts appear to be in accord with the basic principle espoused in Hernandez, as it has been stated that "every effort should be made to avoid trying an accused while in jail garb." Barber v. State, 477 S.W. 2d 868, 869 (Tex.Cr.App. 1972); Ring v. State, 450 S.W.2d 85, 88 (Tex.Cr.App. 1970). Trial in jail clothes has also been the cause of reversed convictions at the state level. See, e. g., Ex Parte Slaton, 484 S.W.2d 102 (Tex.Cr.App. 1972); Ephraim v. State, 471 S.W.2d 798 (Tex.Cr.App. 1971). However, several courts appear to have avoided the issue of prejudice by holding that reference in a trial transcript to the defendant being dressed in a "white suit" or "white coveralls" was insufficient to raise the issue of trial in jail clothes, notwithstanding the allegations of the defendant. See, e. g., Simmons v. State, 480 S.W.2d 633, 634 (Tex.Cr.App. 1972); Pratt v. State, 474 S.W.2d 243, 245 (Tex.Cr.App. 1971); Ellis v. State, 468 S.W.2d 406, 408 (Tex.Cr. App. 1971). None of the foregoing cases considered whether it was a common practice in the convicting court or jurisdiction at the time to try defendants in jail clothes.

The majority of the reported Texas cases appear to place particular emphasis when denying relief on the failure of the defendant or counsel to make formal objection to a trial in jail clothes. See, e. g., Ex Parte Kelly, 484 S.W.2d 773, 774 (Tex.Cr.

App. 1972); Simmons v. State, supra, 480 S.W.2d at 634; Barber v. State, 477 S.W.2d 868, 870 (Tex. Cr.App. 1972); Williams v. State, 477 S.W.2d 24, 26 (Tex.Cr.App. 1972); Wilkinson v. State, 423 S.W.2d 311, 312 (Tex.Cr.App. 1968). In none of these cases does it appear that judicial inquiry was made concerning voluntary waiver by the defendant or his counsel. Such an approach would appear to be insufficient under present federal standards. See Hollins v. Beto, 467 F.2d 951, 952 (5th Cir. 1972).

RETROACTIVITY

With respect to jail clothes cases tried before Hernandez, such as the present case before this Court, the retroactive application of this new constitutional doctrine is not clear. On two occasions the Fifth Circuit Court of Appeals has had the opportunity, but has not seen fit to decide the question. Goodspeed, supra, 460 F.2d at 400; Thomas, supra, 474 F.2d at 981 n. 1. On the other hand, the Texas courts have taken the position that it should be applied retroactively. Ex parte Slaton, 484 S.W.2d 102, 104-105 (Tex.Cr.App. 1972); Ephraim v. State, 471 S.W.2d 798 (Tex.Cr.App. 1971).

(12) Three primary criteria generally have been considered by the United States Supreme Court in determining whether to apply a particular rule retroactively. They are: (1) the purpose to be served by the new standard; (2) the extent of the reliance by law enforcement authority upon old standards; and (3) the effect on the administration of justice of a retroactive application of the new standard. See Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199, 1203 (1967). See also, Annot., 22 L.Ed.2d 821, 825 (1970); Annot., 14

L.Ed.2d 992 (1966). In a recent district court decision the Supreme Court pronouncements concerning retroactivity have been fully analyzed and summarized; this Court will not duplicate this analysis here. Woodall v. Keller, 337 F.Supp. 595, 597-598 (D.Md. 1972), rev'd, 465 F.2d 49 (4th Cir. 1972). As the Supreme Court has stated:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.
>
> It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends. In these situations the new doctrine raises no question about the guilt of defendants convicted in prior trials.
>
> (Footnotes omitted; emphasis added)

Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388, 395 (1971). See also Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed. 2d 29 (1973).

(13) Considering the first of the three criteria noted above, that is, the purpose to be served by the new standard, it is apparent that a key inquiry in determining retroactivity is the effect which the denial of rights or procedures subsequently ruled to be constitutionally mandated might have on the accuracy of the guilt determining process in prior trials. One court in the Southern District of Texas has already considered this question. In Woodrow Wilson Smith v. Beto, Civil Action 71-H-830, at 5 (S.D.Tex., filed May 24, 1972) the test of Hernandez was held to be fully retroactive, it being observed therein that "trial of a defendant in jail clothes penetrates to the very core of due process". Taking into consideration the position of the Texas courts as well as that expressed in Smith, supra, it would appear that retroactive application of Hernandez serves a valid purpose which satisfies this Supreme Court requirement.

The second factor, reliance upon old standards, is not an issue here, as it does not appear that law enforcement authorities at times material to this particular trial were relying upon any particular standard.

(14) The third criterion, the effect of retroactivity upon the administration of justice, is of some concern to this Court and merits exposition. Counsel for the respondent suggest that a retroactive application of the Hernandez rule would open the prison gates and precipitate the release of untold numbers of criminals. This Court has taken note of the evidence which clearly indicates that prior to Hernandez the majority of defendants who were unable to meet bail in Harris County were, in fact, tried in jail clothes. While the argument can be

made that no substantial impairment of the truth finding function of a criminal trial ever resulted from the prosecution of a defendant in jail clothes since that was the generally accepted practice at the time, the fact remains that such a trial is now viewed in this Circuit as inherently unfair and infringing upon the fundamental right of the presumption of innocence. Hernandez v. Beto, supra, 443 F.2d at 636-637; Brooks v. State, supra, 381 F.2d at 624. However, safeguards against any such potential mass release of prisoners are readily apparent. Each case must be evaluated on its own facts. Hollins v. Beto, 467 F.2d 951, 952 (5th Cir. 1972); Hernandez, supra. The fact that a defendant was tried in jail clothes does not per se automatically compel the granting of immediate relief following a habeas corpus hearing such as this one in which the issue is raised. It does require judicial scrutiny to insure that a defendant's criminal trial contains no constitutional deprivations. The possible application of the doctrine of harmless error as evaluated on a case-by-case basis affords ample protection so as to preclude any significant adverse effect upon the administration of justice. Last of all, the burden of proof upon a petitioner in a habeas corpus evidentiary hearing remains intact. Swain v. Alabama, 380 U.S. 202, 227, 85 S.Ct. 824, 13 L.Ed.2d 759, 776 (1965); Hairston v. Alabama, 465 F.2d 675, 677 (5th Cir. 1972); Richardson v. Texas, 425 F.2d 1372, 1373 (5th Cir. 1970). Thus, when measured against the totality of the enunciated Supreme Court standards, the rule of Hernandez passes muster and should be applied retroactively.

CONCLUSION

It is clear from the record in this case and

consistent with the evidence adduced in Dennison, the companion case, that prior to Hernandez there did exist a common practice in Harris County courts to try incarcerated defendants in jail clothing unless they were able to secure some dispensation. The clothing worn varied somewhat, but generally consisted of a white T-shirt with "Jail" or "Harris County Jail" printed on the back, a pair of trousers (white, khaki, or blue jeans) on which the same or similar words were printed in white letters, and, generally, a pair of shower clogs.

(15) There is no doubt but that the Honorable Miron Love had a practice of allowing defendants to stand trial in civilian clothing, if requested, a practice evidently followed by certain of the other judges as well. See Ex Parte Kelly, 484 S.W.2d 773, 774 (Tex.Cr.App. 1972). However, the record does not reveal that Judge Love's practice was publicly known or that it was known to defendants or their counsel. More reasonably, at times material to the petitioner's criminal trial it was the standard practice to have all defendants in custody dressed alike without any policy such as that employed by Judge Love being uniformly adopted by all or even a majority of the criminal district judges in Harris County. Instead, the evidence points to the strong likelihood that the trial climate at that time acted as a natural deterrent to the raising of objections to what was commonplace--a trial in jail clothes, even assuming that defendants or their counsel thought about the problem and considered its legal implications. In the absence of such consideration it can scarcely be concluded that either petitioner in this case or his trial counsel knowingly, willingly and voluntarily waived the right to be tried in civilian clothing. The fact that Williams may have asked

a deputy sheriff to be tried in such clothing and, upon denial, thereafter failed to raise the matter with counsel or the court cannot be viewed as constituting a waiver which satisfies the requirements of this Circuit.

(16) The circumstances surrounding the knifing in this case, all as heretofore set out, are so strong that in this Court's opinion a jury could not have been swayed from a belief of innocence to a finding of guilt because of the defendant's appearance in jail clothes. Whatever harm, if any at all, resulted therefrom was clearly de minimis and squarely fits the doctrine of harmless error beyond a reasonable doubt. Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973); Noble v. Beto, 325 F.Supp. 607 (S.D.Tex. 1971).

A theoretically closer case might be presented with respect to jury consideration of the lesser included offense. The jury was charged in this case that it might find the defendant guilty of assault with intent to murder with malice or guilty of assault with intent to murder without malice. Conviction of the assault with malice carries a possible sentence of 2 to 25 years, whereas the lesser offense of the assault without malice carries a possible sentence of 1 to 3 years. Vernon's Ann. Tex. Penal Code art. 1160 (Supp. 1972-73). (The statute also provides for increased sentences for certain assaults when made with knives, but the state record does not indicate that this provision was considered or employed by the judge.) The court charged the jury that the lesser offense involved "sudden passion arising from an adequate cause" so as to "render the mind incapable of cool reflection". Contrary to the present case, if the material cir-

cumstances could arguably support the contention that the petitioner had experienced an adequate cause so as to be compelled to act by a sudden passion rendering his mind incapable of cool reflection, the possibility exists that a defendant could receive a greater sentence from a jury which was swayed between differing offenses by the presence of the defendant in jail clothes. Such a violation of a defendant's presumption of innocence as to the more serious offense would be constitutionally impermissible under existing law. This Court has carefully screened the record in this case and finds no factual basis which can possibly bring the petitioner within range of the lesser included offense. This being so,

It is the opinion of this Court that the trial of the petitioner in jail clothes, although inherently prejudicial, was nevertheless clearly harmless error beyond a reasonable doubt. Petitioner's application for a writ of habeas corpus must be and is hereby denied.

APPENDIX "C"

Harry Lee WILLIAMS, Appellant,

v.

The STATE of Texas, Appellee.

No. 44545.

Court of Criminal Appeals of Texas.

Feb. 9, 1972.

Rehearing Denied March 22, 1972.

Defendant was convicted in the 177th Judicial District Court, Harris County, Miron A. Love, J., of assault with intent to murder with malice aforethought, and he appealed. The Court of Criminal Appeals, Douglas, J., held that evidence that defendant had pocket knife in his hand while fighting assault victim and that victim was found after fight to have been cut in the throat, stabbed in the chest, cut three times over the heart and once in the stomach, causing partial evisceration, was sufficient from which jury could determine beyond a reasonable doubt that defendant was guilty as charged.

Affirmed.

Morrison, J., did not participate.

1. Criminal Law - 1038 (2, 4)

Where there was no objection in writing or written request for charge on self-defense not given by trial court, matter was not before Court of Criminal Appeals on review even if issue was raised by evidence. Vernon's Ann.C.C.P. arts. 36.14, 36.15.

2. Homicide - 90

A pocket knife is not per se a "deadly weapon" although mode and manner of its use, and wounds inflicted on injured party, are factors in determining character of weapon and the intent to kill.

3. Homicide - 257(4)

Evidence that defendant had pocket knife in his hand while fighting assault victim and that victim was found after fight to have been cut in the throat, stabbed in the chest, cut three times over the heart and once in the stomach, causing partial evisceration, was sufficient from which jury could determine beyond a reasonable doubt that defendant was guilty of an assault with intent to murder with malice aforethought.

4. Criminal Law - 864, 1039

Trial court's use of phrase "there was an intention to kill," in assault with intent to murder prosecution during which court, in response to juror's question, stated that "The charge for the offense is assault with intent to murder with malice aforethought from the indictment and that's all I know about it. There is no death resulting, but there was an intention to kill," although literally appearing to state an opinion, did not do so in context and, in absence of objection at trial to remark, no reversible error was shown.

5. Criminal Law - 1035(3)

Where defendant did not object at or before

trial to being tried in jail clothes, failing to direct that defendant wear something other than county jail clothes during jury trial was not fundamental error.

6. Criminal Law - 641.13(2)

Defense counsel who questioned jury panel extensively on voir dire and cross-examined each of State's witnesses in effort to raise issue of self-defense in assault with intent to murder prosecution did not render ineffective assistance to defendant who complained counsel made only one objection during trial and made no objections to court's charge, introduced no evidence on self-defense and did not subpoena a witness thought necessary by defendant.

Ben L. Aderholt, Houston (Court Appointed on Appeal), for appellant.

Carol S. Vance, Dist. Atty., James C. Brough and James Skelton, Asst. Dist. Attys., Houston, and Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

DOUGLAS, Judge

This is an appeal from a conviction for assault with intent to murder with malice aforethought. Following a jury verdict of guilty, the court assessed the punishment at ten years.

The sufficiency of the evidence is challenged.

On May 29, 1970, appellant went to East 7th Street in Houston to see a Mrs. Kay Tolley. Hearing she was not at home, he awaited her return with some of her neighbors. Eventually Mrs. Tolley appeared followed by her landlord (and appellant's former landlord), Ray Neatherlin. Several steps behind them was Bill Stacy, one of Neatherlin's tenants. Appellant appeared nervous, placed his hand in his right pocket and pulled up his trousers. He approached Neatherlin who asked him for money to cover some "hot checks" (apparently for rent) and accused appellant of leaving his apartment dirty. Appellant denied the accusations. ,Neatherlin told him to either pay his rent or get off his property. Then appellant hit Neatherlin around the neck. During the ensuing fight which lasted several minutes Neatherlin knocked appellant down about three times. Appellant got up each time and "hit" Neatherlin. Then Stacy said: "Ray, look out, I think he's got a knife." Stacy then saw a part of a knife blade in appellant's hand, pulled out a gun and told appellant to drop the knife. Appellant dropped the knife. Stacy then saw that Neatherlin had been "cut all to pieces."

The testimony shows that Neatherlin had been cut in the throat, stabbed in the chest, cut three times over the heart and once in the stomach causing his intestines to hang out. He was taken to the hospital by Stacy where a total of forty-eight stitches were required to repair the cuts.

(1) In his first ground of error, appellant complains that the trial court did not charge the jury on self-defense. Even if the issue of self-defense was raised by the evidence, the matter is not before us for review, because there was no ob-

jection in writing or a written request for such an issue as required by Articles 36.14 and 36.15, Vernon's Ann.C.C.P. Martinez v. State, Tex.Cr.App., 448 S.W.2d 488.

(2, 3) In his second ground of error, appellant contends the evidence was insufficient to prove an assault to murder with malice aforethought. A pocket knife is not per se a "deadly weapon." Barnes v. State, 172 Tex.Cr.R. 303, 356 S.W.2d 679. However, the mode and manner of its use, Richards v. State, 147 Tex.Cr.R. 118, 178 S.W.2d 517, and the wounds inflicted on the injured party, Reed v. State, 149 Tex.Cr.R. 208, 192 S.W.2d 890, are factors in determining the character of the weapon and the intent to kill. The jury had sufficient evidence on these factors to determine beyond a reasonable doubt that appellant had a specific intent to kill Neatherlin. See Samuel v. State, 471 S.W.2d 611 (this day decided).

(4) In a fourth ground of error, appellant complains of a remark made by the trial judge during voir dire examination of the prospective jurors. No objection was made to the statements of the judge, His contention is that the trial judge conveyed to the prospective jurors his opinion of the case when he responded to one of their questions. The judge had just stated to the prospective jurors that it would be the court's responsibility to charge upon the law and their responsibility to apply the facts to the law. When he asked if any juror felt he or she could not do this the following occurred:

> "A JUROR: Pardon me, does this mean the taking of a life or something like that might be involved?

"THE COURT: The charge for the offense is assault with intent to murder with malice aforethought from the indictment and that's all I know about it. There is no death resulting, but there was an intention to kill. (Emphasis supplied) Is that your question, what the charge or what the result of a conviction might be?

"A JUROR: That's right."

The trial judge then told them that "the result of a conviction would not be the responsibility of this jury to determine." He continued, however, to explain the possible range of punishment for assault to murder with malice aforethought and without malice aforethought and of the possibility of probation. He concluded by telling them again that the issue of guilt would be the only one for them to determine and asked if this answered the question. The juror replied that it did.

Appellant complains of the emphasized words above. While the words literally appear to state an opinion they do not do so in the context of the judge's remarks. He also told them in these remarks that "I cannot anticipate what the facts will be in the case, because I haven't heard the evidence."

Hence, we conclude that the remark made in the particular context was not such that could be reasonably calculated to prejudice the appellant's rights. Howard v. State, Tex.Cr.App., 420 S.W.2d 706. Further, we note that no objection was made to the remark. See generally Minor v. State, Tex. Cr.App., 469 S.W.2d 579. No reversible error is shown.

(5) In a supplemental brief appellant claims the trial court committed fundamental error by failing to direct that appellant wear something other than Harris County Jail clothes during his jury trial. The record reflects two references to appellant's dress during the trial: one referred to him as wearing a "white uniform" and the other as wearing a "uniform". During voir dire of the jury panel the following statement was made by the prosecutor:

"This defendant is sitting in jail clothes. I am assuming he's been in jail to the time of this trial. You are not to take this into consideration. The fact a man is in jail clothes shouldn't make you feel he is guilty any more than if he were in street clothes."

The record reflects that this voir dire took place between 10:45 and 11:50 a. m. The jury was sworn in, the indictment read, a plea of "not guilty" entered, and the appellant was arraigned prior to separation for lunch. Undoubtedly the prospective jurors did view appellant in jail clothes.

Appellant claims that trying him in jail clothes infringed his fundamental right to be presumed innocent. Appellant did not object to this at or before trial. In Ephraim v. State, Tex.Cr. App., 471 S.W.2d 798, the defendant objected to being tried before a jury in jail clothing.

Absent an objection, it is presumed that he was willing to go to trial in jail clothing.

"A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim

error." Hernandez v. Beto, 443 F.2d 634, 637 (5th Cir. 1971).

We are in agreement with this statement by the Fifth Circuit.[1] No error is shown.

(6) Finally, appellant complains in his third ground of error of ineffective assistance of counsel at trial. Although the record shows that appellant requested and was appointed counsel, the attorney so appointed did not represent him at the trial. It is not shown if trial counsel was appointed or retained. He complains that trial counsel made only one objection during the trial and made no objections to the court's charge, introduced no evidence on self-defense and did not subpoena a witness thought necessary by the appellant.

The record shows that counsel had the case postponed from July 15, 1970, to November 9, 1970. Counsel questioned the jury panel extensively on voir dire and cross-examined each of the State's witnesses attempting numerous times to raise the issue of self-defense. He was, however, unsuccessful in getting anyone to support his theory that Neatherlin was the aggressor. In his jury argument he argued that the facts showed no intent to kill and even attempted to argue self-defense. The record as a whole shows "(t)he trial could not be classified as a farce or mockery of justice which was shocking

---

[1] Often as a matter of strategy, an appellant wants to be tried in jail clothing. It is common for a defense counsel to prove before the jury how long a person has been in jail. Garcia v. Beto, 452 F.2d 655 (5th Cir. 1971).

to the conscience of the Court, or one where the purported representation was only perfunctory, in bad faith, sham, pretense, or without adequate opportunity for conference or presentation." Thompson v. State, (No. 44,071, November 2, 1971).

We conclude that appellant's contention is without merit.

There is no reversible error. The judgment is affirmed.

MORRISON, J., not participating.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-3854

D. C. Docket No. CA-72-H-432

HARRY LEE WILLIAMS,
Petitioner-Appellant,

versus

W. J. ESTELLE, Director, Texas Department of Corrections, and C. V. KERN, Sheriff,
Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before TUTTLE, COLEMAN AND AINSWORTH,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the

said District Court with directions in accordance with the opinion of this Court.

September 6, 1974

Issued as Mandate:

Supreme Court, U. S.
FILED
MAR 19 1975
MICHAEL RODAK, JR., CLERK

A P P E N D I X

SUPREME COURT OF THE UNITED STATES

TERM, 1974

NO. 74-676

W. J. ESTELLE, JR.,
Petitioner

v.

HARRY LEE WILLIAMS,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED
NOVEMBER 29, 1974
CERTIORARI GRANTED JANUARY 27, 1975

SUPREME COURT OF THE UNITED STATES

TERM, 1974

NO. 74-676

W. J. ESTELLE, JR.,
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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N O T A T I O N

The following items appear in appendicies to the Petition for Certiorari at the pages noted and are not reproduced in this Appendix:

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Opinion of the United States District Court. 1b

Opinion of the Court of Criminal Appeals of Texas . . . 1c

Judgment of the United States Court of Appeals for the Fifth Circuit 1d

RELEVANT DOCKET ENTRIES

1. Petition For Writ Of Habeas Corpus

2. Order To Amend Pleadings

3. Petitioner's First Amended Original Petition

4. Respondent's Motion To Dismiss And Answer

5. Reporter's Transcript Of Federal Habeas Proceedings

6. Memorandum And Opinion Denying Habeas Relief

[fol. 54] * * *
[fol. 55]

IN THE ____ UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY LEE WILLIAMS)
)
v.) NO. CA72H432
)
C. V. KERN)

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, HARRY LEE WILLIAMS, Petitioner in the above cause, and files this its Petition for Writ of Habeas Corpus and to that end would respectfully show that Petitioner seeks, in this Court of equity, to inquire into the legality of the restraint of Petitioner's personal liberty, as follows:

I.

That, HARRY LEE WILLIAMS, is imprisoned and restrained of his liberty in the Harris County Rehabilitation Center at 2310 Atascocita Road, Humble, Harris

County, Texas; by C. V. "Buster" Kern, Sheriff of Harris County, Texas.

II.

That imprisonment is by virtue of a commitment for ten (10) years, resulting from a conviction on November 9, 1970, in Cause No. 151,738; State of Texas vs. Harry Lee Williams; In the 177th District Court of Harris County, Texas, which conviction was appealed by appointed counsel, the undersigned attorney, to the Court of Criminal Appeals of Texas, Cause No. 44,545, which Court of Criminal Appeals affirmed said conviction, and overruled Petitioner's Motion for Rehearing on March 22, 1972.

III.

First Ground

Petitioner would show that the Trial Court committed fundamental error and the Texas Court of Criminal Appeals' failure to correct same being error, by its failing to direct that Petitioner wear something other

than Harris County Jail clothes [fol. 56] during his jury trial. The fact that Petitioner was tried in jail clothes infringed his fundamental right of presumption of innocence.

Facts

Although Petitioner made no in Court objection (the Trial being prior to the holding in Hernandez v. Beto), the District Attorney told the jury panel:

> "this Defendant is sitting in jail clothes" (R 45 L 19).

Both of the State's principle witnesses pointed out Defendant as wearing a white uniform (R 108 L 17 and R 141 L 21). The record shows that Defendant told the Court that he was in jail during trial (R 241 L 3) and that he was in street clothes on the night of the arrest (see picture R 243).

Petitioner would rely on Hernandez v. Beto, 443 F2d 634, 637 (5th Cir 1971) which declares that to try a Defendant in

his prison garb infringes his fundamental right of presumption of innocence:

> "The record makes it abundantly clear that no objection was lodged by counsel to the prison garb worn by Hernandez because, at the time, it was common practice to try prisoners held in jail in their prisoner clothing, and that a motion for a change of attire, in counsel's opinion, would have been denied as frivolous." Hernandez, p 636.

Petitioner would show that his case and that of Hernandez were tried in the same courthouse within a few months of each other, in the same district, under the same procedure and practices.

The 5th Circuit went on to cite the rather obsolute language in Brooks v. Texas, 381 F2d 619, 624 (5th Cir 1967) where it said:

> "It is inherently unfair to try a Defendant for a crime while garbed in his jail uniform, especially when his civilian clothing is at hand."

The Court continued in Hernandez:

> "under these circumstances we cannot equate the inherent unfairness of being tried in prison garb with harmless error. [fol. 57] The probable impact on the jury of Hernandez' appearance in the Courtroom makes it impossible for us to declare a belief that it was harmless beyond a reasonable doubt." (at p. 637).

The case at bar and the Hernandez case are one and the same in regard to the prison garb issue. Further, Garcia v. Beto, ___ F2d___ (No 71-1383 5th Cir) is not applicable here because the defense did not try to prove how long Defendant had been in jail as a means to elicit sympathy from the jury. The State mentioned Defendant's prison garb first, and Defendant did what he could to minimize the harm done to the presumption of innocense. Counsel was well aware that all prisoners in the 177th District Court of Harris County, as well as every single other Court

of Harris County, were tried in prison clothes prior to Hernandez v. Beto, which was handed down while this case was pending before the Texas Court of Criminal Appeals.

Further, Petitioner would show that nowhere does the record show that Defendant intelligently waived the fundamental right of presumption of innocence.

IV.

Second Ground

Appellant would further show that Defendant was denied the assistance of effective and competent counsel.

Petitioner was declared and certified an indigent by the Trial Court long before trial and appointed an attorney for trial purposes, and later appointed present counsel for purpose of appeal. It should be assumed from the state of the record, that trial counsel was appointed since

nothing shows otherwise. This Petitioner should,therefore, come within the rule stated in Rodriguez v. State, 340 SW2d 61 (Tex Crim App) where it was declared the Trial Court had the burden and duty to see that trial counsel has the ability to protect the rights of the Defendant. Trial counsel did not make a single objection to the avalanche of seriously objectionable testimony and evidence; nor did he make any objection to the Court's charge or press for the submission of a self defense issue; and Trial counsel failed to [fol. 58] call a single witness for the defense. Such inaction by the trial counsel can be none other than ineffective counsel as the rule was laid down in Vessels v. State, 432 SW2d 108, 116 (Tex. Crim App).

V.

Petitioner would show he has exhausted his state remedies, in that he raised both of these issues before the Texas Court

of Criminal Appeals in his written brief, along with three (3) other points of error, and again in his Motion for Rehearing. To substantiate same, Petitioner hereby makes request of the Texas Court of Criminal Appeals to deliver the record, or a copy of same, of the said appeal, available to this Honorable Court, and that such be free of charge to Petitioner for the reason that he is indigent and has been from the commencement of this entire cause, which allegation is supported by attached affidavit.

Further, Petitioner requests appointed counsel for purposes of the Writ Hearing.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Petition be set for hearing and this Court grant a Writ of Habeas Corpus for the purpose of setting an evidentiary hearing to determine the legality of the restraint of said Peti-

tioner; and upon final hearing hereof, that this Honorable Court order Petitioner's release or retrial on this cause in accordance with law; and further, if this Petition be denied after a hearing, that the Court, pursuant to Rule 52(a), file its Findings of Fact and Law.

Respectfully submitted,

HARRY LEE WILLIAMS

APPROVED:

TIPTON, BISHOP & COMPANY

BY: s/ BEN L. ADERHOLT
BEN L. ADERHOLT
Attorney for Petitioner
608 Fannin, Suite 1500
Houston, Texas 77002 (223-4644)
APPOINTED COUNSEL BY STATE OF TEXAS FOR STATE APPEAL ONLY

[fols. 59-67] * * *

[fol. 68)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ORDER ENTERED ON JUDGE'S CALENDAR

9/5/72: Defendant's Motion to Dismiss or, in the Alternative, Motion for Judgment on the Pleadings is denied at this time. In view of plaintiff's response thereto, plaintiff is directed to amend his complaint to include all proper defendants as parties and to make proper service. All defendants shall thereupon respond to such amended complaint. Clerk shall notify parties.

C.O.B., Jr.

[fol. 69]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY LEE WILLIAMS, Petitioner	X	
VS.	X	CIVIL ACTION NO. 72-H-432
C. V. KERN, Sheriff, et al Defendant	X	

PETITIONER'S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, HARRY LEE WILLIAMS, Petitioner, in the above cause, by counsel, who has been appointed by the Honorable Carl Bue, and files this its Petition for Writ of Habeas Corpus and to that end would respectfully show that Petitioner seeks, in this Court of equity, to inquire into the legality of the restraint of Petitioner's personal liberty, as follows:

I.

Petitioner has discovered, since the institution of this suit, that Plaintiff

has been transferred from the custody of C. V. KERN, to Mr. George Beto, and/or his successor, at the Texas Department of Corrections in Huntsville, Texas. Plaintiff would therefore request service to be made upon said custodian forthwith.

II.

That, HARRY LEE WILLIAMS, is imprisoned and restrained of his liberty by virtue of a commitment for ten (10) years, resulting from a conviction on November 9, 1970, in Cause No. 151,738; State of Texas vs Harry Lee Williams; In the 177th District Court of Harris County, Texas, which conviction was appealed by appointed counse, the undersigned attorney, to the Court of Criminal Appeals of Texas, Cause No. 44,545, which Court of Criminal Appeals affirmed said conviction, and overruled Petitioner's Motion for Rehearing on March 22, 1972.

III.

First Ground

Petitioner would show that the Trial Court committed fundamental error and the Texas Court of Criminal Appeals' failure to correct same being error,by its failing to direct that Petitioner wear something other than Harris County Jail clothes [fol. 70] during his jury trial. The fact that Petitioner was tried in jail clothes infringed his fundamental right of presumption of innocence.

Facts

Although Petitioner made no in Court objection (the Trial being prior to the holding in Hernandez v. Beto), the District Attorney told the jury panel:

> "this Defendant is sitting in jail clothes" (R 45 L 19).

Both of the State's principle witnesses pointed out Defendant as wearing a white uniform (R 108 L 17 and R 141 L 21). The

record shows that Defendant told the Court that he was in jail during trial (R 241 L 3) and that he was in street clothes on the night of the arrest (see picture R 243).

Petitioner would rely on Hernandez v. Beto, 443 F2d 634, 637 (5th Cir 1971) which declares that to try a Defendant in his prison garb infringes his fundamental right of presumption of innocence:

> "The record makes it abundantly clear that no objection was lodged by counsel to the prison garb worn by Hernandez because, at the time, it was common practice to try prisoners held in jail in their prisoner clothing, and that a motion for a change of attire, in counsel's opinion, would have been denied as frivolous." Hernandez, p 636.

Petitioner would show that his case and that of Hernandez were tried in the same courthouse within a few months of each other, in the same district, under the same procedure and practices.

The 5th Circuit went on to cite the rather obsolute language in Brooks v. Texas, 381 F2d 619, 624 (5th Cir. 1967) where it said:

> "It is inherently unfair to try a Defendant for a crime while garbed in his jail uniform, especially when his civilian clothing is at hand."

The Court continued in Hernandez:

> "under these circumstances we cannot equate the inherent unfairness of being tried in prison garb with harmless error. [fol. 71] The probable impact on the jury of Hernandez' appearance in the Courtroom makes it impossible for us to declare a belief that it was harmless beyond a reasonable doubt." (at p 637).

The case at bar and the Hernandez case are one and the same in regard to the prison garb issue. Further, Garcia v. Beto, ____F2d____ (No 71-1383 5th Cir) is not applicable here because the defense did not try to prove how long Defendant

had been in jail as a means to elicit sympathy from the jury. The State mentioned Defendant's prison garb first, and Defendant did what he could to minimize the harm done to the presumption of innocense. Counsel was well aware that all prisoners in the 177th District Court of Harris County, as well as every single other Court of Harris County, were tried in prison clothes prior to Hernandez v. Beto, which was handed down while this case was pending before the Texas Court of Criminal Appeals.

Further, Petitioner would show that nowhere does the record show that Defendant intelligently waived the fundamental right of presumption of innocence.

IV.

Second Ground

Appellant would further show that Defendant was denied the assistance of effective and competent counsel.

Petitioner was declared and certified an indigent by the Trial Court long before trial and appointed an attorney for trial purposes, and later appointed present counsel for purpose of appeal. It should be assumed from the state of the record, that trial counsel was appointed since nothing shows otherwise. This Petitioner should, therefore, come within the rule stated in Rodriguez v. State, 340 SW2d 61 (Tex Crim App) where it was declared the Trial Court had the burden and duty to see that trial counsel has the ability to protect the rights of the Defendant. Trial counsel did not make a single objection to the avalanche of seriously objectionable testimony and evidence; nor did he make any objection to the Court's charge or press for the submission of a self defense issue; and Trial counsel failed to [fol. 72] call a single witness for the defense. Such inaction by the trial counsel can be

none other than ineffective counsel as the rule was laid down in Vessels v. State, 432 SW2d 108, 116 (Tex Crim App).

V.

Petitioner would show he has exhausted his state remedies, in that he raised both of these issues before the Texas Court of Criminal Appeals in his written brief, along with three (3) other points of error, and again in his Motion for Rehearing. To substantiate same, Petitioner hereby makes request of the Texas Court of Criminal Appeals to deliver the record, or a copy of same, of the said appeal, available to this Honorable Court, and that such be free of charge to Petitioner for the reason that he is indigent and has been from the commencement of this entire cause, which allegation is supported by attached affidavit.

Further, Petitioner requests appointed counsel for purposes of the

Writ Hearing.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Petition be set for Hearing and grant a Writ of Habeas Corpus for the purpose of setting an evidentiary hearing to determine the legality of the restraint of said Petitioner; and upon final hearing hereof, that this Honorable Court order Petitioner's release or retrial on this cause in accordance with law; and further, if this Petition be denied after a hearing, that the Court, pursuant to Rule 52(a), file its Findings of Fact and Law.

Respectfully submitted,

TIPTON, BISHOP & COMPANY

By s/ BEN L. ADERHOLT
BEN L. ADERHOLT
Attorney for
Petitioner
608 Fannin,
Suite 1500
Houston, Texas
77002
223-4644

APPOINTED COUNSEL
BY STATE OF TEXAS
FOR STATE APPEAL

[fol. 73-76] * * *
[fol. 77]

CIVIL ACTION NO. 72-H-432

* * *

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

* * *

HARRY LEE WILLIAMS,
Petitioner

V.

C. V. KERN AND GEORGE J. BETO,
Respondent

* * *

RESPONDENT'S MOTION TO DISMISS AND ANSWER

* * *

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes C. V. Kern, Sheriff of Harris County, and Dr. George J. Beto, Director of the Texas Department of Corrections, and makes this Motion to Dismiss

and Answer in the above numbered and entitled cause. Petitioner Williams is presently in custody of the Texas Department of Corrections in Huntsville, Texas, and therefore Sheriff Kern is not a proper party for this cause.

I.

Respondent denies each and every allegation of fact made by Petitioner, except those facts supported by the record and those specifically admitted herein.

II.

Petitioner Harry Lee Williams was convicted of assault to murder in the 177th District Court of Harris County, Texas, on November 9, 1970, after a plea of not guilty (Cause No. 151738). [fol. 78] He was sentenced to 10 years in the State Penitentiary. Appeal was taken to the Texas Court of Criminal Appeals which affirmed the conviction. Williams v. State, 477 S.W.2d 24 (Tex.Crim. 1972). Petitioner's Motion

for Rehearing was overruled on March 22, 1972.

III.

This Court has jurisdiction of the subject matter and the parties herein, pursuant to 28 U.S.C., Section 2241 et seq.

IV.

Petitioner in this cause alleges that he was tried in jail clothes, which infringed his fundamental right of the presumption of innocence. Also, Petitioner claims ineffective representation of trial counsel.

V.

Petitioner bases his first ground (i.e. regarding his being tried in jail clothes) almost entirely on the Fifth Circuit's opinion in Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971). However, a careful reading of Hernandez indicates that the decision does not automatically

support the position which Petitioner is asserting in the present cause. As opposed to the facts of Hernandez, the record in the present case does not make it abundantly clear that the reason why counsel failed to object to the jail uniform worn by Petitioner was because he felt it would be frivolous. Obviously the fact that Hernandez and the present case were tried in the same courthouse within a few months of each other in no manner affects the present habeas corpus cause.

Under these circumstances the present case differs factually from Hernandez. As noted in a Fifth Circuit case decided subsequent to Hernandez:

> "This Court has stated that it is inherently unfair to try a defendant in prison garb [citing Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967], but [fol. 79] that each case must be considered in its own

> factual context to determine whether the conviction from such trial must be set aside [citing Hernandez]." Garcia v. Beto, 452 F.2d 655 (5th Cir. 1972).

In the present case, there are indications that the Petitioner had knowingly waived his right to be tried in civilian clothes. As noted by the Court in its opinion on a Petition for Rehearing in Hernandez, some burden must be placed on the Defendant and his attorney to make known that the Defendant desires to be tried in civilian clothes before the State can be held accountable for his being tried in jail clothes. At page 637 the Court states:

> "A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error."

As noted above the present cause differs from Hernandez in that there is no indication that trial counsel's failure to object was not grounded on the reasoning that he felt any such objection would be

frivolous.

The trial record indicates that no objection was raised by Petitioner or his counsel concerning his being tried in jail clothing. In the absence of an affirmative showing that an objection was made in the trial court and overruled, a presumption of waiver of any constitutional right to be tried in civilian clothing should exist. The language in Johnson v. Zerbst, 304 U.S. 458, 468-469,58 S.Ct. 1019, 1025 (1938) cited with approval the Fifth Circuit case of Nash v. United States, 342 F.2d 366 (5th Cir. 1965). Although referring to the denial of any alleged constitutional right, including the jail clothing issue as here alleged:

> "It must be remembered, however that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of

> regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not completely and [fol. 80] intelligently waive his constitutional right to assistance of counsel." (Emphasis added.)

Where, as in the language quoted, the burden is on Petitioner when he was tried without counsel, even greater is the compulsion to place the burden on Petitioner where he did have the assistance of counsel at the time objection should have been raised, as is here the case. See also Hawk v. Olson, 326 U.S. 271, 66 S.Ct. 116 (1945); Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574 (1941). The Texas Court of Criminal Appeals considered this ground on direct appeal and is in accordance with the above authorities.

Finally, Respondent's position is that any prejudice that could have been caused by Petitioner's being tried in jail clothes would have been harmless. The fact that State's witnesses identified the Defendant as wearing a "white uniform" was not fundamentally prejudicial, particularly where the Defendant was in plain view of the jury at all times and when no objection to this type of identification was lodged. The same holds true with the referral made by the District Attorney to the jury panel (R. 45), as he was merely cautioning the prospective jurors against any prejudice which might be caused from this obvious situation.

In addition, the case against Petitioner was quite strong. There were three eyewitnesses who testified for the State and who gave damaging testimony (R. 143, 172-173, 186-197), as

well as testimony from the victim of the assault. (R. 116-117). This aspect along with the above circumstances should be sufficient to allow this Court to hold that Petitioner's being tried in jail clothes was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967); Hernandez, supra at 637. See Klingler v. Erickson, 328 F.Supp. 674 (S.D.S.Dak. 1971).

VI.

Petitioner's second ground concerns ineffective assistance [fol. 81] of trial counsel. The Court of Criminal Appeals also considered this point on direct appeal. At page 27 of the Court's opinion this matter is thoroughly analyzed, and Respondent adopts this language as properly disposing of the issue:

". . . He [Petitioner Williams] complains that trial counsel made only one objection during the trial and made no objections to the court's charge, introduced no evidence on self-defense and did not subpoena a witness thought necessary by the appellant.

"The record shows that counsel had the case postponed from July 15, 1970, to November 9, 1970. Counsel questioned the jury panel extensively on voir dire and cross-examined each of the State's witnesses attempting numerous times to raise the issue of self-defense. He was, however, unsuccessful in getting anyone to support his theory that Neatherlin was the agressor. In his jury argument he argued that the facts showed no intent to kill and even attempted to argue self-defense. The record as a whole shows "[t]he trial could not be classified as a farce or mockery of justice which was shocking to the conscience of the Court, or one where the purported representation was only perfunctory, in bad faith, sham, pretense, or without adequate opportunity for conference or presentation." Thompson v. State, ___ S.W.2d ___ (No. 44,071,

November 2, 1971.

"We conclude that appellant's contention is without merit."

None of the allegedly incompetent acts of trial counsel [failure to object to evidence or the Court's charge; failure to press for a submission of the issue of self-defense; failure to call any defense witnesses (R. 271)] are shown by the record to have denied Petitioner of effective assistance of counsel. See Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); Moore v. Beto, 458 F.2d 386 (5th Cir. 1972); United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972); Hegwood v. Swenson, 344 F.Supp. 226 (W.D.Mo. 1972).

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the application for writ of habeas corpus be dismissed, or in the alternative, denied.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of
Texas

[fols. 82-185] * * *

[fol.1]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRY LEE WILLIAMS, Plaintiff	X	
VS.	X	CIVIL ACTION NO. 72-H-432
C.V. KERN and DR. GEORGE BETO, et al, Defendants.	X	

* * * * *

[fols. i,ii] * * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS

[fol.2]

A P P E A R A N C E S

For the Petitioner:

Messrs. Tipton & Bishop
1500 Texas Professional Tower
Houston, Texas

By: Ben L. Aderholt, Esq.

For the Respondent:

Attorney General's Office
2603 Carlow Drive
Austin, Texas

By: E. Bruce Curry, Esq.

[fol.3]

P R O C E E D I N G S

THE COURT: This morning's case is 72-H-432, a case of writ of habeas corpus, Harry Lee Williams vs. C. V. Kern, Dr George Beto, Director, et al.

What says counsel for the petitioner?

MR. ADERHOLT: Petitioner is ready, Your Honor.

THE COURT: Counsel for the respondent?

MR. CURRY: We are ready, Your Honor.

THE COURT: Very well. In order that the record may be clear, I'm going to ask that each of you state in capsule form, taking no more than a couple of minutes to summarize what it is that we are doing here this morning, what your respective positions are and what you expect to prove. Mr. Aderholt.

MR. ADERHOLT: Yes, Your Honor. I am counsel for petitioner, and we have filed an application for writ of habeas corpus for relief based on the recent rulings of the [fol.4] Fifth Circuit in Hernandez vs. Beto, which held that the trial of a defendant in a criminal trial before a jury was fundamental error. We will prove that the petitioner was tried in jail clothes against his will, and we will have two witnesses, the defendant himself and his counsel at time of trial. And we will, in argument, if the Court desires it, try to show the history of the cases from Brooks down to Thomas, which is the most recent Fifth Circuit case.

THE COURT: Very well, thank you. Mr. Curry.

MR. CURRY: Your Honor, respondent takes the position in this case that the Hernandez doctrine as originally laid out

by the Fifth Circuit is no longer the absolute language as it was once originally proposed. Since the time of Hernandez, many Fifth Circuit cases have come down, all of which have chipped away at the original Hernandez doctrine, and in today's hearing we will attempt to show that no relief should be granted on the jail clothes issue, because there was a waiver of any objection to the [fol.5] jail clothes issue, and also, in the alternative, that there was obviously harmless error involved in accordance with the Beto vs. Thomas decision.

THE COURT: What do you view the test to be today?

MR. CURRY: Well, excuse me, Your Honor, I --

THE COURT: Hernandez was a broad holding, and you say that subsequent cases have chipped away.

MR. CURRY: Yes.

THE COURT: Where are we today?

MR. CURRY: Your Honor, I feel today that due to the Fifth Circuit decision, primarily in Garcia and in Thomas, that we have opened up areas such as trial tactics by the trial counsel, and --

THE COURT: We don't have that, do we?

MR. CURRY: I don't believe so, Your Honor, not in this case.

THE COURT: Garcia really isn't in this case. Now, what does Thomas do?

MR. CURRY: Thomas states it [fol.6] where the evidence was overwhelming so that a jury could find no other way but in their verdict of guilty that the error, if any, was harmless beyond all reasonable doubt. Under the Chapman and Herrington cases, these two decisions have been created by the Fifth Circuit subsequent to Hernandez, and we submit also that there is the waiver situation, the direct waiver situation, and this is

present in the current case that we are talking about this morning.

THE COURT: All right, thank you. Mr. Aderholt, call your first witness.

MR. ADERHOLT: Your Honor, at the outset we would like to introduce the transcript of the State trial record, and I believe the Clerk has the original of that document. If not, I will submit a copy, a Xeroxed copy.

THE COURT: Very well, the transcript of the State Court proceeding will be given a number.

MR. ADERHOLT: Very well.

THE COURT: Petitioner's Exhibit No. 1?

[fol.7]

MR. ADERHOLT: Yes, Your Honor.

THE COURT: All right, it's admitted.

(The document referred to was marked "Petitioner's Exhibit No. 1" and was received in evidence.)

MR. ADERHOLT: We refer to Plaintiff's 1 as the State of Texas -- the transcript of the State of Texas vs. Harry Lee Williams under Cause No. 151, 738 in the 177th District Court of Harris County.

THE COURT: All right.

MR. ADERHOLT: We would also, Your Honor, offer the depositions which were taken pursuant to written interrogatories, pursuant to Rules 31 and 32; Mr. Marion Sanford, Clarence Kendall, Mr. C. H. Neal Duvall, Mr. D. Wayne Walker and James Weir.

THE COURT: You want them identified separately or as one exhibit?

MR. ADERHOLT: I think we should probably have them separate, Your Honor, since some of the answers are different.

THE COURT: All right. Designate [fol.8] for the record which one is which. Do you have an objection to these?

MR. CURRY: The only objection I have is I have never seen a copy of these answers. I was served with the notice of the depositions themselves, and I would request that I see the answers.

THE COURT: When were they filed?

MR. ADERHOLT: I'll have to check.

MR. CURRY: I believe the 31st of May is when I received notice.

MR. ADERHOLT: They were timely filed, and if the Clerk has the originals -- they have been filed.

THE COURT: July 5, 1973 is the date of filing. Were not copies sent to --

MR. ADERHOLT: Yes, Your Honor.

THE COURT: -- counsel for the respondent?

MR. ADERHOLT: Yes, sir, I believe the certificate is found in -- Mr. Thomas Pletcher certifies that --

THE COURT: You filed no cross interrogatories, Mr. Curry?

[fol.9]

MR. CURRY: No, Your Honor. I did obtain affidavits from certain of these people in expectation of these answers but I did not file cross interrogatories.

THE COURT: Very well, they will be admitted. If you will give them precise numbers, Mr. Aderholt.

MR. ADERHOLT: Yes, sir.

THE COURT: So, that the record is clear.

MR. ADERHOLT: That of Mr. Clarence Kendall will Be Plaintiff's 2, Mr. Marion Sanford will be three, Mr. James Weir will be Plaintiff's 4, Mr. Wayne Walker will be Plaintiff's 5, and Mr. Duvall will be Plaintiff's 6.

THE COURT: All right, they will be admitted.

(The documents referred to were marked "Petitioner's Exhibits 2,3, 4,5 and 6", and were received in

evidence.)

MR. ADERHOLT: At this time, we would ask the State if it would stipulate to the docket entries of the Clerk of the [fol.10] 177th District Court as to those cases that were on the docket during the month of October and November. We have an affidavit from the Court Clerk certifying that the cases that were on the docket during the month of October and November.

MR. CURRY: No objection, Your Honor.

THE COURT: All right.

MR. ADERHOLT: I ask that the Clerk's affidavit certifying the docket be marked and accepted as Plaintiff's 7.

THE COURT: Plaintiff's Exhibit No. 7 is admitted.

(The document referred to was marked "Petitioner's Exhibit No. 7" and was received in evidence.)

MR. ADERHOLT: We would call Mr.

Chester Darnell as the Petitioner's first witness.

THE COURT: Raise your right hand to be sworn, please.

(Witness sworn.)

[fol.11]

CHESTER E. DARNELL,

called as a witness in behalf of the petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ADERHOLT:

Q State your full name to the Court, please, sir?

A Chester Earl Darnell.

Q Mr. Darnell, are you an attorney licensed under the State of Texas to practice law?

A Yes, I am.

Q And how long have you been so licensed?

A 1961.

Q Since 1961?

A Yes.

Q Mr. Darnell, were you counsel on November the 9th, 1970 in the State of Texas vs. Harry Lee Williams in the 177th District Court for Mr. Williams?

A Yes, I was.

Q Were you present during the whole trial?

A Yes, I was.

Q Did you have co-counsel?

A No, I did not.

Q So, you were in charge of the defense from beginning to end for Mr. Harry Lee Williams?

[fol.12]

A That is correct.

Q Did you see Mr. Williams appear before the jury in that trial?

A Yes, I did.

Q What was his appearance? What did he have on?

A He had on what is referred to as jail garb, it's the white uniform that the persons that are incarcerated at the Rehab Center wear.

Q Okay. Did he appear before the panel during time of voir dire and during the trial in principal before the jury?

A Yes, he did, that's what he wore during the entire trial.

Q Did he change clothes at all during the time of the entire proceeding?

A The garments may have been changed but they were the same type.

Q Did you hear the attorney for the State of Texas -- rather for -- yes, the District Attorney, refer to the defendant being in some sort of jail clothes?

A Yes, I recall Mr. Jim Skelton

mentioning that he was in jail clothing, or something to that effect.

Q Did you allow this -- did you intend Mr. Williams [fol.13] to remain in jail clothes as a trial tactic?

A No, I did not.

Q Did you intend the jury to -- this fact to elicit any sympathy from the jury?

A No, sir.

Q I'll ask you, if you -- when was the first time that you heard of the Hernandez decision, was it before or after this trial?

A It was after this trial.

Q I would ask you if we had, for purposes of a hypothetical question, a man that would be charged with the same crime as Mr. Williams was, the same facts, same identical circumstances, and he were in a suit, had a tan, was clean, made a good appear-

ance before the jury, and compare that to Mr. Williams' actual appearance before the jury in his case, and ask you if there could be any impact upon the jury's mind of the appearance of such to defendants?

A Yes, there could.

Q Do you think that this would affect the jury's view of this man's innocence?

A It could. Individual people think differently. It could make an impact upon them. [fol.14]

Q Mr. Darnell, were you ever conscious of waiving the right to have Mr. Williams tried in civilian clothes?

A No, sir.

Q So, if I were to ask you if you intelligently and knowingly waived the right to be tried in civilian clothes Mr. Williams' right to be tried in civilian clothes, would you say that this was not your intention?

A It was a practice in the Court to try people that appeared in jail garb in jail garb. When they appeared in jail clothing, they normally were tried as that.

Q Did you ever have any kind of experience along this line previously?

A Well, in the case of State vs. Otis Lee Hopson, Tom Berry and I were counsel for Mr. Hopson, and that was in Judge Wendell Odom's Court, prior to the trial, on Sunday, we went to the Rehab Center and discussed with the Deputy Sheriff about Mr. Hopson appearing in his civilian clothes and were told that he would. At the time of trial, Mr. Hopson had on his jail garb. Mr. Berry and I mentioned that to Judge Odom and he [fol.15] informed us that the jury panel was on its way down and he remarked something to the effect, "That you boys better

be ready." And we proceeded to trial, and he was in jail garb, and it appeared to me that when people appeared in that garb, they usually went to trial in whatever they had on.

Q This was prior to Hernandez, prior to the handing down of the Hernandez decision?

A Yes, sir.

Q I'll ask you then, Mr. Darnell, if you thought that the same practice did apply in Judge Love's Court as far as your past experience is concerned?

A I thought that it applied in all the Harris County Courts.

Q So, you did not object because you thought the practice was that all these -- that the Judge would probably have ruled as Judge Odom did, you were to proceed in jail clothes?

A That is correct.

MR. ADERHOLT: Pass the witness, Your Honor.

THE COURT: All right, cross examine.

[fol.16]

CROSS EXAMINATION

BY MR. CURRY:

Q Mr. Darnell, did you state that you were court appointed in this trial?

A No, I did not.

Q Were you court appointed?

A No, I was not.

Q You were retained?

A By Mr. Williams, yes.

Q All right, and did you state that you were licensed in 1961, is that correct?

A Yes.

Q Can you tell the Court approximately in some manner how many criminal cases you had handled prior to this 1970

trial, approximate estimation?

A Well, I practiced general law, I have some civil and some criminal, I don't know the approximate number. I had been in Judge Love's Court before prior to this time.

Q All right. In the present case, what was Mr. Williams charged with?

A Assault with intent to murder.

Q All right. Did you investigate this trial? Investigate the facts surrounding this matter prior to trial?

[fol.17]

A I talked with Mr. Williams at the Harris County Jail downtown on a number of occasions, I don't recall, but it was more than one, and I visited with him and talked with him at the Rehab Center on a number of occasions. And I reviewed the fact situation with Mr. Jim Skelton, the

District Attorney, as to -- well, what his feelings were as to what he was going to try to get at the time of trial, you know, if the defendant were found guilty and the number of years.

Q All right. After you had completed your investigation and at the time of trial, what type of defense did you offer in the defendant's behalf?

A During the trial, the question as to whether he was defending himself, self defense, and cross examination of the witnesses that Mr. Skelton had put on, I attempted to bring out the point that he was defending himself. Mr. Williams did not testify at the trial, but in my cross examination, there were two witnesses that I calculated that I could bring that point out better than some of the others. Mrs.

Williams, who was a German citizen, had [fol.18] not been here too long, was one, and -- I can't recall the other lady's name offhand.

Q In your opinion did you succeed?

A From the results I did not.

Q Did you attempt to have a charge submitted on self defense?

A I discussed that with Mr. Skelton and Judge Love. Judge Love was of the opinion that there was no evidence submitted at the time of trial that would bring up that issue.

Q All right. Mr. Darnell, you have stated that the defendant did not take the stand in his trial, exactly why didn't he take the stand, do you recall?

A Well, that's something that he would have to answer to why he did not.

Q All right. Did you advise him in

any respect, pro or con, as to taking the stand and testifying?

A Well, at the conclusion, after Mr. Skelton rested, it appeared that the greater weight were against him, which it would be at that point, he could get on the stand and testify in his defense. He had on jail garb and he said he just didn't want to get on the stand [fol.19] at that time, he did not want to.

Q Then, is it your testimony that you advised him that he probably should take the stand at that time if he was going to take it?

A Well, I gave him what my opinion was as to the weight of evidence that had been submitted.

Q Did you prevent him from taking the stand, did you in any respect?

A No, sir.

Q Okay. And is it your testimony that in your opinion this was the only method of establishing self defense at this period due to the absence of other witnesses, or any overwhelming evidence in favor of the self defense issue, is that correct?

A The person that could best testify to that would be Mr. Williams at that time. The other witnesses had not testified that it was self defense.

Q That's what I was asking you. In your opinion, at that time, was the only way you felt you could get the self defense issue before the Court was to have Mr. Williams testify? Was that your opinion at that point in the trial?

A Well, the trial had been concluded before that [fol.20] issue was sub-

mitted to the Judge.

Q I'm talking about at the time when the State rested, at that point did you feel that you could get the self defense issue before the Court in any other manner than by having the defendant himself testifying?

A No, sir.

Q Okay. I believe you've testified that the defendant was tried in jail clothing. Did either you or the defendant raise any objection or in any other manner attempt to request that the Court allow the defendant to have the opportunity to be tried in civilian clothing?

A No, no objection was made to the Court.

Q All right. Is there any particular reason why you did not object other than your past experience in another Judge's Court?

A Well, I felt it would be futile to object, everyone else was being tried in jail clothes and he was ready for trial, so whatever he had on, we went to trial.

Q Mr. Darnell, your statement, "everybody was being tried in jail clothes," what did you base that on other than your one prior occasion?

A Well, the other prisoners that came in -- I say [fol.21] everybody, I probably should correct that, other individuals had on jail garb in Court and were being tried in jail garb, or appearing before the bench the same as Mr. Williams did. I mean, he was not the only person that was before the Court that had on jail garb.

Q Were you personally aware of this taking place in Judge Love's Court?

A I observed that there were other individuals that had jail garb on that were appearing in his Court.

Q Did you ever see any of the individuals or their attorneys object to the wearing of jail clothing and have it overruled by the Court?

A Not during this trial, or not during this period when we were in Court, no, sir.

Q Ever? Have you ever seen this in Judge Love's Court?

A No, sir.

Q Your Honor, at this time I'd like to have the certificate of Judge Love marked and introduced into evidence. I believe the Clerk has a copy.

THE COURT: All right.

MR. CURRY: I mailed it in as a supplemental answer, I believe. Your [fol.22] Honor, I believe I filed this

certificate earlier with my amended answer in this cause, I have a Xeroxed copy of the certificate with me, but --

THE COURT: Take the Xeroxed copy, and unless counsel has some objection, we can move along.

MR. ADERHOLT: Yes, I've seen this. Your Honor, we are going to object to it on the basis we have been afforded no opportunity for us to cross examine. This is absolutely hearsay and would be self-serving.

THE COURT: It will be overruled.

MR. CURRY: This is Respondents' Exhibit 1.

THE COURT: All right.

(The document referred to was marked "Respondent's Exhibit No. 1" and was received in evidence.)

Q (Continuing) Mr. Darnell, I am holding a certificate which has been executed by Judge Myron A. Love, Judge, 177th District Court, executed -- notarized on March 6, 1973. [fol.23] This certificate, in effect, states that his -- the Judge's policy has been to allow any person tried in his courtroom in jail clothing who objected or requested civilian clothing to have the opportunity to be tried in civilian clothing, and in fact, I believe Judge Love even states that he would attempt to furnish a defendant with civilian clothing if they were not available in any other manner, and also states that this has been done on prior occasions in his Court.

Now, is it your testimony that you were completely unaware of any such policy in Judge Love's Court?

A I had never seen that come up when I was in his Court that anyone requested and put on civilian clothing, changed from the jail garb.

Q But you never requested this of Judge Love in this particular trial, is that correct, you never asked?

A That is correct.

Q Okay. And I believe you stated that the reasons you didn't object was because you considered it futile, is that correct?

A That is correct.

[fol.24]

Q Mr. Darnell, is there any way this can be aligned properly with your statement that you were not aware of Judge Love's policy? In other words, how could you think something was futile if you had no idea one way or the other about the particular Judge's policy?

A I had not discussed his policy with him. As I stated earlier, in Judge Odom's Court, the policy apparently was that he appear in jail clothing, you're going to trial, you're going to trial.

Q And you assumed Judge Odom's rule applied to Judge Love's rule?

A I assumed since so many people appeared in jail garb and were being tried in Harris County Courts, it appeared to be a policy, if that's the way they arrived, that's the way they were tried. I had cases that people had on civilian clothes, and also jail garb and had gone to trial.

Q Mr. Darnell, a moment ago, also you stated in your opinion, I believe on a hypothetical situation, or anyway your opinion, that anyone tried in jail clothes was prejudiced

and you would in any case rather have the person tried [fol.25] in civilian clothing, is that correct?

A It could make an unfavorable impression upon some jurors, and if he has got on civilian clothing, well that possiblity would be eliminated.

Q Okay. Your, Honor, at this time I would like to -- well, have this marked as Respondents' Exhibit 2. This is an affidavit from Mr. Marion Sanford, Jr., who is one of the attorneys who answered the interrogatories propounded by the petitioner, only for the statement therein that in his opinion trying a person in jail clothing had no effect upon the jury in the cases which he had tried, only for this purpose.

MR. ADERHOLT: Object, Your Honor. If he wanted to get such statements from counsel he could

have gotten them through cross interrogatories.

THE COURT: This is a non-jury case and it will be given appropriate weight. I'll permit it to be introduced. Defendants' Exhibit 2 you're offering now? [fol.26]

MR. CURRY: Yes, sir.

MR. ADERHOLT: Your Honor, I want to make sure my objection is entered in the record that this is hearsay and not --

THE COURT: Your objection is noted.

MR. ADERHOLT: Thank you, Your Honor.

THE COURT: It will be admitted.

(The document referred to was marked "Respondents' Exhibit No. 2" and was received in evidence.)

MR. CURRY: Your Honor, also at this time, could I have these marked as Defendants' 3 and 4?

At this time I have what is marked Respondents' 3 which is an affidavit signed by Mr. Clarence Kendall, and Exhibit No. 4 which is an affidavit signed by Mr. James L. Weir, both of whom were attorneys who answered Petitioner's written interrogatories. These affidavits [fol.27] were, as I stated earlier, obtained by me in lieu of answers to the written interrogatories, and for that purpose I would like to submit them.

THE COURT: All right. Have you seen these, Mr. Aderholt?

MR. ADERHOLT: No, Your Honor, I haven't seen any of these affidavits

THE COURT: All right.

MR. ADERHOLT: Your Honor, I would offer the same strong objection to these, they're not propounded according to the rules as counsel for the petitioner has tried

to do, and further, this does not afford me any opportunity to cross examine these witnesses, these statements.

THE COURT: Mr. Aderholt, I'm fully aware of what you say. They will be admitted and given appropriate weight.

MR. ADERHOLT: Thank you, Your Honor.

(The documents referred to were marked "Respondents' Exhibit [fol.28] No. 3" and "Respondents' Exhibit No. 4" and were received in evidence.)

MR. CURRY: That's all the questions I have.

THE COURT: All right, will there be any redirect?

MR. ADERHOLT: I'll just point out to the Court that Judge Love does not say in his certificate that he would

furnish clothes. I think counsel probably referred to that by mistake.

- - - - -

REDIRECT EXAMINATION

BY MR. ADERHOLT:

Q Mr. Darnell, just one question, who was Miss Tolly?

THE COURT: Miss who now?

Q Miss Tolly, T-o-l-l-y. Miss Tolly, was she not a girlfriend or female friend of Mr. Williams as far as you know?

A As I recall, Miss Tolly was a lady that come in from Illinois, and Mr. Williams went by the [fol.29] airport and gave her a ride to the apartment complex. He knew Miss Tolly, was acquainted with her, and I think had worked at a photographic company with her. She was at this apartment complex when this incident took place. I discussed with W. B.

Thornton, who was the man that Mr. Williams had worked for and was acquainted with Miss Tolly, and Miss Tolly left shortly after that and went back to Illinois. At the testimony of the trial, as I recall, it was stated that she had gone to Kansas or some place, but she was a lady that was present when this incident occurred.

Q From your investigation of the facts and also from the testimony adduced in the trial, was it your opinion that there was probably a love triangle between the defendant, Miss Tolly, and the complaining witness, Mr. Netherland?

A Well, I did not approach that on the basis -- what you say may be true, that was not something that I was considering that there may have been a love triangle.

Q Do you know whether at all this fight

that the crime arose out of developed partially over [fol.30] her, or do you remember?

A Well, as to why the fight occurred, it's difficult to say. The testimony at the trial was it started over some checks that were made by someone other than Mr. Williams. When Mr. Williams was approached about the rent --

Q Those checks had been paid prior to this time, also, were they not?

A As I understand Mr. Williams had given the checks to Mr. Netherland, but Mr. Williams was not the maker of those checks, he did not originally write them.

MR. ADERHOLT: We have no further questions.

THE COURT: Any further examination?

MR. CURRY: No, Your Honor.

THE COURT: All right, you may step down.

Call your next witness.

MR. ADERHOLT: Call Mr. Williams, Your Honor.

THE COURT: All right. Mr. Williams.

(Witness sworn.)

[fol.31]

HARRY LEE WILLIAMS,

the petitioner, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ADERHOLT:

Q State your full name to the Court?

A Harry Lee Williams.

Q You are the same Mr. Williams that was the defendant in the case in which Mr. Netherland was the complaining witness?

A Yes, sir.

Q And you have heard the testimony of

Mr. Darnell up to this point?

A Yes, sir.

Q And was Mr. Darnell your counsel during the trial --

A That's true.

Q I would ask you, Mr. Williams, whether or not you were tried in a prison uniform?

A I were. I had on white dungarees, they were too large for me, and I had on a pair of those shower slippers about that long (indicating), and they had "Jail" stamped across the back and on the legs.

Q Okay. Do you remember what other people, other [fol.32) defendants had on --

A Everyone that was in the tank they dressed that out at the Rehab did have those kind of clothes on.

Q Was this true in the holdover tank behind Judge Love's Court?

A That's true, all of them had the same kind of clothes on. Now, I did ask for my clothes out there, that Capt. Cleveland, at the trial, had pressed for me, and they said wear them, everybody else is wearing them.

Q Now, you're saying -- what other clothes did you have?

A I had a pair of boots and a pair of trousers and a sweater out there, and I started to Court, and I asked about getting them. Mr. Cleveland, he was the Capt. Cleveland out there, I asked him would he have the trousers taken out and pressed for me and he said he would, and the date I started to dress, I asked for my clothes and they said, wear them, everybody else is wearing them.

Q What are they talking about wearing them?

A Wear them that had court stamped on the clothes.

Q Are you saying that you requested civilian [fol.33] clothes?

A They told me to wear them.

Q To wear what?

A To wear the -- I requested to wear my clothes and they handed me them others like everybody else was dressing out and I didn't have no difference, only to wear them.

Q Mr. Williams, do you think that you would have made a better appearance to the jury if you had on your other clothes?

A Well, you know, appearance goes a long way in the public, and I think if I would have been dressed different, why I would have -- they would have given the jury more impression than what they did have to go on.

Q I ask you, Mr. Williams, if you -- I

asked you a few questions about the complaining witness, Mr. Netherland, do you know whether he was -- you saw him at the trial, did you not, he was at the trial?

A Yes, sir.

Q Do you remember how heavy he was?

A Mr. Netherland weighed about 215 pounds and was 6'5", 6'3" or 6'4" tall and was around 36 years old.

[fol.34]

Q And do you remember how many people came up to you at the time of the fight?

A Well, Miss Dillon had called me to come and carry her -- I had picked her up the Sunday before at the airport on that Delta Airline at 3:45, brought her down to her apartment and she was going back, and she called me that day and asked me to come down here and get another bag

and see about a box to ship her mattress in.

Q My question is, how many people came up to you just at the beginning of this fight?

A Well, Kay came up and then right behind her, Mr. Netherland and this other fellow was coming right around the corner behind her, I was sitting on the porch talking to these women waiting on Kay to get back.

Q Okay. Did one of these men have a pistol?

A Mr. -- this Ray had it. He testified he had it behind him, he didn't, he had it in his left pocket, and Mr. Netherland had me by the arm where these scars is here, beating me. I never did get on the ground, I was trying to keep him from hitting me in the face, and he had this gun down there, but he wouldn't

stop them from beating me, and this officer testified all the hide was off my knees and left arm.

Q I'll ask you if you were afraid at the beginning of this fight?

A Naturally I would be, sir, because he was much bigger than I was, and the fact of business, I didn't think there was any trouble abrewing until he grabbed me by the arm and went to whipping. He first said, "Get away from her, you ain't going to carry Kay no where."

MR. ADERHOLT: Pass the witness.

THE COURT: All right, cross examine.

CROSS EXAMINATION

BY MR. CURRY:

Q Mr. Williams, did you or your counsel either object or request to the trial court, the Judge, to allow you to

wear civilian clothing at your trial?

A Well, I imagine the reason, sir, that everybody had them on --

Q My question was --

[fol.36]

THE COURT: Mr. Williams, answer the question that is asked, don't answer anything else. We will move along much more rapidly.

THE WITNESS: Thank you, sir.

THE COURT: Repeat your question.

Q (Continuing) Did you or your counsel request, make a request to the trial Judge that you be tried in civilian clothing?

A No, sir, there wasn't nothing said about it.

Q Do you know why there was nothing said about it, did you discuss this with your own counsel?

A Why I didn't say anything?

Q Yes, sir.

A Because all the other people coming out of the Rehab and was in the hold-over tank with me had the same kind of clothes on that I had on.

Q All right. And Mr. Williams, why didn't you take the stand and testify?

A Well, I didn't think I had any case in there, and I had a little trouble in about twenty-five years ago and I didn't want that to come out.

Q You had a prior record?

A Yes, sir, it was 1953.

Q Was that the primary reason why you decided

[fol.36]

not to take the stand?

A That's right.

Q Did your counsel attempt to prevent you in any way from taking the stand?

A He didn't -- he said. "You may have to

take the stand." I told him I didn't want to, and on the 10th when Mr. -- started the case on the 9th, and after they testified, this Mr. Netherland and this Ray testified, the police, the Judge Love asked was any more witnesses, and they both said no. He says, Court is recessed until 10:00 o'clock in the morning. That was November the 10th, and then when he, Mr. Netherland, come back that day, he had these women with him, but they more so testified for me, kind of testified to the truth. He went and talked to those women, lived in his apartment, and brought them with him on November the 10th, that's the date I was tried, not on the 9th.

MR. CURRY: That's all the questions we have, Your Honor.

MR. ADERHOLT: I have no further questions.

THE COURT: All right, you may

step down. Call your next witness.

(Witness excused.)

MR. ADERHOLT: That's all the witnesses we have, Your Honor, at this time.

I don't know the propriety of this, Your Honor, and I don't really know the law, the applicable law on this, but I would like to ask the Court to take judicial notice of the official reports of the cases that I have cited in my brief that have come from the Harris County Courthouse. In other words, the Hernandez, the Ellis, the Williams, the Simons, the Thomas, the Smith and ex parte Kelly cases. I believe the Court can take judicial knowledge of the official reports, the decisions, as they have been reported in the Southwestern and --

THE COURT: Mr. Aderholt, I have read your brief, I've read it twice. What is it outside of the holdings of the cases that you wish to point out?

[fol.38]

MR. ADERHOLT: Only that these men were tried in jail clothes, and I wish the Court to take judicial knowledge of the opinions in those cases, that these men were tried in jail clothes in Harris County. That's the gist of my offer.

THE COURT: All right.

MR. ADERHOLT: Thank you, Your Honor.

THE COURT: Anything further?

MR. ADERHOLT: That's all, Your Honor.

THE COURT: Are you ready to go forward?

MR. CURRY: I would like to call Mr. Jim Skelton, please.

(Witness sworn.)

- - - - -

[fol.39]

JIM SKELTON,

called as a witness in behalf of the respondents, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CURRY:

Q Would you please state your full name for the record?

A Jim Skelton.

Q And your occupation?

A Lawyer.

Q How long have you been licensed in the State of Texas?

A Since September of 1967.

Q All right. Were you serving as prosecutor on the District Attorney's staff here in Harris County during November of 1970?

A Yes, sir.

Q Did you prosecute often before the 177th District Court, was this your Court, so to

[fol.40]

speak?

A I was the chief prosecutor and tried most of the cases in there.

Q How long did you serve or appear before the 177th?

A About a year and a half, I would say.

Q All right. And who was the Judge during this time?

A Myron Love.

Q All right. Was he the Trial Judge in the Harry Lee Williams case?

A Yes.

Q All right. Do you remember very clearly the circumstances of that 1970 trial?

A Yes, sir, fairly well.

Q And did you actually prosecute the entire trial?

A Yes, sir.

Q All right. Do you recall whether or not the defendant wore jail clothing in that trial?

A The only thing I recall, I remember on voir dire I asked the jury the fact he was in jail clothing would this prejudice the jury or not. I remember inquiring about that on voir dire examination, because I've had occasions

[fol.41]

when people wore jail clothes and sometimes they were sympathetic, and sometimes they were hostile. I made inquiry of the voir dire part whether anybody was prejudiced or against him because he was in jail clothes. I remember that, that he was wearing jail clothes and made that comment.

Q Okay. Who represented the defendant in the trial?

A Chester Darnell.

Q All right. To your personal knowledge as a prosecutor before this Court, did Mr. Darnell ever handle any other cases, criminal cases in 177 Court prior to this 1970 trial?

A This is the first case I had tried against Chester Darnell, I had seen him in there before, but as far as actual trials, this is the first one.

Q In your Opinion as a prosecutor, or to your knowledge, did Judge Love have any particular policy regarding the wearing of jail clothes as of the time of this 1970 trial?

A Yes, sir.

Q All right. And basically what was that policy?

[fol.42]

A If anybody ever made an objection we would permit people to bring up clothes and dress them out, let them use the jury room. In fact, one

instance, a defendant was tried in Judge Love's suit. This was prior to this. Judge Love lent him a suit, not the one he had on, he didn't go out in just his robe, he got another suit and lent it to the man. I remember this happened, and on several occasions we had people that came up that brought clothing from home and we permitted them to dress back in the jury room.

Q So, this policy had been carried out to your personal knowledge --

A Yes, sir.

Q -- on prior occasions. All right. To your recollection, did either the defendant or his counsel, Mr. Darnell, ever object to his wearing jail clothes or in any other manner request to the Trial Court that he be allowed to wear civilian clothes in the trial?

A No, sir, there as no objection made, and at no time nobody ever asked me to make any comment about him being in jail clothes.

Q And you stated what the Judge's policy was,

[fol.43]

I'll ask you, in your opinion, if such a request or objection had been raised in the Harry Lee Williams' trial, would Judge Love have granted such objection based upon his policy?

A Absolutely.

Q All right. Are you clear upon the actual facts involved, the evidence introduce, the testimony in this trial, do you remember them clearly?

A Yes, I remember the evidence itself quite well.

Q All right. Looking at the evidence in its entirety, was it your opinion that the evidence was such that you

might class this as a good State's case or a poor State's case?

A I think it would be a very good State's case.

Q Was it the type case could have gone either way? Are you saying it was a very, very strong case?

A I would have been very surprised if he had been found not guilty, because the injuries were quite severe.

Q Would you elaborate on what evidence you based this upon?

A Well, there were about three different things I think that stood out in my mind, at least,

[fol.44]

I talked to the jury, also, because at that time I still made a practice of calling on jurors to see what they think and the things that I thought about the case were strong. There was one man, I forgot his name, Ray

somebody, that was present with the complaining witness who testified that Mr. Williams held a knife like a knife fighter, whatever that's supposed to be, held the knife open with the blade across his index finger, and slashed several times like an experienced knife fighter. In fact, I think this man, Ray, had done some work in karate or judo, or something in the service, and he knew about this. This testimony came in the manner in which the knife was used.

Also, the testimony showed that during the trial that the complaining witness was not aware of the fact he was cut, and his intestines were hanging out, and he was ripped across the stomach. In fact, I think we showed the scars, I'm not certain if we did that or not, but I do know the man was holding his insides with his

hands, and those two factors, plus we had a number of witnesses

[fol.45]

that saw the whole transaction, plus it had occurred on property owned by the complaining witness, which made an impression upon the jury. He owned the apartment complex and had asked the man to leave. Those three factors, his property, the severe injuries and the method in which the injuries were inflicted, in my opinion made a very strong State's case.

Q Was Mr. Darnell, according to the facts available, able to present any defense, or what defense did he present?

A He did probably what I would have done had I been defending, he rested behind the State.

Q What do you mean by that?

A I've done that frequently, I've always felt -- I do nothing but criminal work now and defense work, and I never felt a -- I think what lawyers strive to do is overdo it and try to prove innocence, and that isn't their job as a defense attorney, and I think one of the smarter tactics a defense attorney can use is rest behind the State unless they have got something that they can come forward with.

In this particular instance, the only

[fol.46]

witness Mr. Darnell had that could possibly help him was a woman who moved out of the State and he had nothing else in my opinion. I would have done the same thing he would have done.

Q Okay. And why, in your opinion, was

the issue of self defense not brought forward in this trial, do you have any feeling on that?

A Yes, under the rules in the State Court, the only time self defense can ever be submitted to a jury is if an exculpatory statement is solicited by the prosecutor -- for example, if I was prosecuting and I asked a witness was it self defense, and this person said yes, this is an exculpatory statement and you're automatically entitled to self defense if the prosecutor brings it out through their witnesses. I did not do this, that didn't come into that viewpoint. The second time self defense is raised is when a defendant takes the stand and testifies he was in fear of his life, under an unlawful attack, and there was one instance under case law, I've never seen it done, and it's theoreti-

cally possible, is when the totality of the circumstances, a great number [fol.47] of the witnesses testify about the severity of the attack, and you more or less assume that the defendant was in fear of life.

In all cases I've tried, the only time we have ever submitted self defense is when a person took the stand and testified to the essential elements of self defense. There was actually no evidence in my opinion to submit the issue of self defense.

MR. CURRY: That's all we have, Your Honor.

THE COURT: All right, cross examine.

CROSS EXAMINATION

BY MR. ADERHOLT:

Q Mr. Skelton, if Mr. Williams had

taken the stand and developed in more detail the facts as I indicated them to us here which you have heard, do you think that there is a bare possibility that one juror might have believed his version?

A There is always that possibility.

Q So, as a defense counsel, Mr. Darnell was faced [fol.48] with a twenty-five year old conviction, prior conviction on this man, as opposed to setting up a possible self-defense defense in this case, and he chose to leave him off the stand, but hindsight -- looking at this thing from hindsight, do you think it was as good a choice to put him on the stand?

A I wouldn't have put him on.

Q Why?

A No. 1, the punishment ranged from two to twenty-five years. He could

have very easily gotten twenty-five years for this case, if he had alienated the jury. The jury -- I don't believe there were but about four or five people that said, that was on the State's side that testified -- you would have one man that would get up, and I bet the jury would have thought he was lying and would have added some more years on for lying. I've seen that happen, I've seen defendants get ten years for the crime and fifteen for lying. I'm not saying they would have lied, I'm saying they would have to believe somebody and I would pretty sure think the jury would not have believed Mr. Williams, and this usually [fol.49] aggravates the jury.

Q Okay. But, still, the self-defense issue is a valuable tool for the de-

fense, the issue itself?

A If it's reasonable it is, but in this instance you have one guy saying it was and about four or five saying it wasn't.

Q You still say that there was a bare possiblility --

A Absolutely.

Q Now, after the Hernandez decision was handed down, was there a change from your vantage point in that Court from day to day by the Sheriff's Department in what defendants, jail cases wore?

A To tell you the truth, I don't even know. I very seldom went back to the holdover, I presume they started dressing them in their clothes they were arrested in. We had a lot of objections shortly after that. In two cases I remember quite well, there were three people accused of

robbery, and the description of their clothing was what they were arrested in, and I think one guy was wearing a green shirt and black pants and they brought him out wearing the plack pants and green shirt, and [fol.50] they got very upset with that because the clothing they were dressed in was the clothing they were arrested in, and it matches the description of the robbers. Another case I know of where there was a lot of wailing and turmoil about it, there was a man accused of robbery and was dressed up as a transvestite, and they brought him out in his female clothes, and that upset everybody greatly. They started putting people in the clothes they were arrested in.

Q Don't they still do that?

A Ben, I don't really know. What I have done on several occasions, I'll bring up a suit from home and take it back to the jury room.

Q Mr. Skelton, you're over there as much as I am, you know that they don't put them in those jail clothes any more.

A I don't guess they do, I suppose not.

Q Have you ever seen a man since Hernandez who came out in Harris County Jail on the day of the trial or any day in his prison wear?

A No.

Q But this was very common before Hernandez, was it not?

[fol.51]

A I guess so. I don't -- in fact, we didn't pay that much attention to it, never was a big issue to us. I know when they had the staff meeting and announced Hernandez, it

didn't really make a dent on our policy at all.

Q Are you saying that the Sheriff's Office didn't change its practice?

A I don't know what the Sheriff's Office did, I have no earthly idea. I suppose it did.

MR. ADERHOLT: We have no further questions.

THE COURT: Be any redirect?

MR. CURRY: No, Your Honor.

THE COURT: You may step down, sir. Call your next witness.

(Witness excused.)

MR. CURRY: The respondent rests, Your Honor.

THE COURT: All right. Will there be any rebuttal?

MR. ADERHOLT: No.

THE COURT: This concludes all the proof in the case?

MR. ADERHOLT: Yes.

MR. CURRY: Yes.

[fol.52]

THE COURT: Very well, let me hear -- perhaps we should do this. We will take a brief recess following which I would like to hear ten minutes of oral argument from each side relating the law to the proof that's been adduced here this morning.

We will stand recessed for ten minutes.

(Recess taken.)

THE COURT: All right, Mr. Aderholt, let me hear from you first, please.

(Mr. Aderholt presented oral argument on behalf of the petitioner.)

THE COURT: All right, let me hear from you, Mr. Curry.

(Mr. Curry presented oral argument on behalf of the repondent.)

THE COURT: Is there anything before we adjourn?

MR. ADERHOLT: No, sir, Your Honor.

[fol.53]

MR. CURRY: No, Your Honor.

THE COURT: Very well, this Court will stand adjourned.

(Whereupon at 12:00 o'clock noon, Court was adjourned.)

Supreme Court U. S.
FILED
MAR 19 1975
MICHAEL RODAK, JR., CLERK

EXHIBITS

SUPREME COURT OF THE UNITED STATES

TERM, 1974

NO. 74-676

W. J. ESTELLE, JR.,
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FILED NOVEMBER 29, 1974
CERTIORARI GRANTED JANUARY 27, 1975

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[fol.4]

REQUEST FOR APPOINTMENT OF COUNSEL AND
ORDER OF THE COURT THEREON.
FILED JUNE 19, 1970

CAUSE NO. _____

THE STATE OF TEXAS	X	IN THE ___ DISTRICT
	X	COURT OF HARRIS
V.	X	COUNTY, TEXAS
	X	
HARRY WILLIAMS	X	

(Charges filed in Judge Touchy's Court
No. 336166 - June 10, 1970)

REQUEST FOR APPOINTMENT OF COUNSEL

NOW COMES Harry Williams defendant in the above-entitled and numbered cause and respectfully shows the Court

(1) that I have been charged with the offense of ASSAULT TO MURDER (Presently pending before the Grand Jury)
(2) that I am too poor to employ counsel.

THEREFORE, I respectfully request the Court to appoint counsel to defend me.

s/ Harry Lee Williams
Defendant

BEFORE ME the undersigned authority on this the 8th day of June, 1970, per-

sonally appeared Harry Williams who after being by me duly sworn stated upon oath that the above facts are true and correct.

(Notary Seal)

s/ Jack Paul Cox
Notary Public in and for Harris County, Texas

O R D E R

The Court being satisfied that the above-named defendant is too poor to employ counsel:

IT IS ORDERED THAT FRANCIS L. WILLIAMS, 711 Main, CA 7-9238 a member of the Bar is hereby appointed to represent the defendant in all matters pertaining to this action in this and any subsequent court until relieved by order of the Court.

In addition to the foregoing appointed trial counsel, it is further ordered that JIM LOVETT, a staff attorney of the Houston Legal Foundation, is hereby appointed to advise and counsel with the appointed

trial counsel in the preparation of the defense.

Done this 16th day of June, 1970.

s/ E. B. Duggan
Judge Presiding

[fol.5]

INDICTMENT NO. 151738
FILED: JUNE 29, 1970

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jury of Harris County, State of Texas, duly organized at the May Term, A.D. 1970 of 177th District Court _____ of said County, in said Court, at said term, do present that

HARRY LEE WILLIAMS

on or about the 20th day of May, A.D. 1970, in said County and State, did with malice aforethought in and upon Ray Neatherlin make an assault, with the intent then and there to kill the said Ray Neatherlin.

Against the peace and dignity of the State.

s/ Alan Grab
Foreman of the Grand Jury.

[fol.6] * * *

[fol.7]

CHARGE OF THE COURT
FILED: NOVEMBER 10, 1970

CAUSE NO. 151,738

THE STATE OF TEXAS	IN THE 177TH DISTRICT
	COURT OF HARRIS
V.	COUNTY, TEXAS
	NOVEMBER TERM,
HARRY LEE WILLIAMS	A. D. 1970

MEMBERS OF THE JURY:

The defendant, Harry Lee Williams, stands charged by indictment with the offense of assault with intent to murder, with malice aforethought, one Ray Neatherlin, alleged to have been committed in Harris County, Texas on or about the 20th day of May, A.D. 1970. To this charge the defendant has pleaded not guilty.

In order that you may understand the nature of the offense with which defendant is charged, it is necessary that the court define for you the offenses of assault and of murder.

1.

The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture, showing in itself or by words accompanying it an immediate intention, coupled with an ability to commit a battery, is an assault.

By the expression "coupled with an ability to commit a battery" is meant that the person making the assault must, at the time, be in such a position and within such distance of the person so assailed, that, if not prevented, he may inflict a battery upon such person by the use of the means with which he attempts it. [fol.8]

2.

Whoever shall voluntarily kill any person within this State shall be guilty

of murder. Murder is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide, or which excuse or justify the killing.

Murder, as defined above, may be committed either with or without malice aforethought.

"Malice aforethought" is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken.

Murder without malice aforethought is a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary

temper sufficient to render the mind incapable of cool reflection.

3.

Now if you believe from the evidence beyond a reasonable doubt that on or about the 20th day of May, A.D. 1970, in Harris County, Texas, the defendant, Harry Lee Williams, with malice aforethought, as that term has been defined, did make an assault in and upon Ray Neatherlin by stabbing him with a knife, with the intent to then and there kill the said Ray Neatherlin, you will find the defendant guilty of an assault with intent to murder with malice aforethought.

[fol.9]

4.

If you find from the evidence beyond a reasonable doubt that the defendant, at the time and place aforesaid, did then and there make an assault in and upon Ray Neatherlin by stabbing him with a

knife, with intent to then and there kill the said Ray Neatherlin, but from all the facts and circumstances in evidence, both those occurring at or about the time of the stabbing and prior thereto, you have a reasonable doubt as to whether the defendant was prompted by malice aforethought, as that term has been defined herein, then you will find the defendant guilty of assault with intent to murder without malice aforethought.

5.

If, from the evidence you believe beyond a reasonable doubt that the defendant, under the instructions given you in this charge and under the facts in evidence, is guilty of an assault with intent to murder Ray Neatherlin, but, from all facts and circumstances in evidence at or about the time of the stabbing, and prior thereto, you have a reasonable doubt whether the defendant was prompted with

malice aforethought, then you must give the defendant the benefit of that doubt, and in such case, you can only find him guilty of an assault with intent to murder without malice aforethought.

In any event, unless you find from the evidence beyond a reasonable doubt that defendant is guilty of assault with intent to murder, or if you have a reasonable doubt thereof, you cannot convict him of that grade of offense, either with malice aforethought or without malice aforethought.

[fol.10]

6.

You are instructed that an intent to kill is an essential element of assault with intent to murder, and unless you find from the evidence beyond a reasonable doubt that at the time the defendant stabbed the said Ray Neatherlin, if he did, the defendant had the specific intent then and

there to kill the said Ray Neatherlin, or if you have a reasonable doubt thereof, you cannot find defendant guilty of assault with intent to murder.

[fol.11]

A defendant in a criminal case is not bound by law to testify in his own behalf therein but the failure of any defendant to so testify shall not be taken as a circumstance against him nor shall the same be alluded to nor commented upon by the jury, and you must not refer to, mention, comment upon or discuss the failure of the defendant to testify in this case, and any juror doing so may be guilty of contempt of court. If any juror starts to mention the defendant's failure to testify in this case then it is the duty of the other jurors to stop him at once.

[fol.12]

A grand jury indictment is the means whereby a defendant is brought to trial

in a felony case. It is not evidence of guilt nor can it be considered by you in passing upon the question of guilt of the defendant. The burden of proof in all criminal cases rests upon the state throughout the trial, and never shifts to the defendant.

The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him. You are the exclusive judges of facts proved, of the credibility of the witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as

your foreman. It is his duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto, and signing the same as Foreman.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

[fol.13]

After you have retired, you may communicate with this court in writing through the officer who has you in charge. Do not attempt to talk to the officer, the attorneys, or the court concerning any questions

you may have. After you have reached a unanimous verdict, the Foreman will certify thereto by using the appropriate form attached to this charge and signing his name as Foreman. After argument of counsel you may retire to consider your verdict.

s/ Miron J. Love
Judge Presiding

[fol.14]

VERDICT OF THE JURY

FILED: NOVEMBER 10, 1970

"We, the Jury, find the defendant, Harry Lee Williams, not guilty."

Foreman of the Jury

"We, the Jury, find the defendant, Harry Lee Williams, guilty of the offense of assault with intent to murder with malice aforethought as charged in the indictment."

s/ W. H. Crisp
Foreman of the Jury

"We, the Jury, find the defendant, Harry Lee Williams, guilty of the offense of assault with intent to murder without malice aforethought."

Foreman of the Jury

[fol.15]

MINUTES OF THE 177TH DISTRICT COURT OF HARRIS COUNTY, TEXAS. AT NOVEMBER TERM, 1970

J U D G M E N T

NO. 151738 :

THE STATE OF TEXAS :

V. :DATE NOVEMBER 9, 1970

HARRY LEE WILLIAMS :

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of assault with intent to murder with malice aforethought, and this cause being this day called for trial, the State appeared by her District Attorney and the Defendant, Harry Lee Williams, appeared in person and by Counsel, Chester E. Darnell, and both parties announced ready for trial. The Defendant was arraigned, and in open court pleaded not guilty to the charge contained in the indictment. Thereupon a jury composed of

W. H. Crisp and eleven others was selected, impanelled, and sworn; and after hearing the indictment read, the Defendant's plea of not guilty thereto, and the evidence submitted; and after having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant; and after hearing the argument of counsel, they retired in charge of the proper officer and returned into open court on the 10th day of November, 1970, the following verdict, which was received by the Court and is here entered of record upon the minutes:

"We, the Jury, find the defendant, Harry Lee [fol.16] Williams, guilty of the offense of assault with intent to murder with malice aforethought as charged in the indictment." /s/ W. H. Crisp, Foreman of the Jury

Thereupon, the Defendant having requested in writing at the time he entered

his plea of not guilty, in open court, that the Judge assess the punishment, and in accordance with law the Court proceeded to hear further evidence on the issue of punishment.

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense of assault with intent to murder with malice aforethought, a felony, as found by the jury, and that he be punished by confinement in the Texas Department of Corrections for ten years, and that the State of Texas do have and recover of the Defendant all costs of the prosecution, for which execution will issue, and that the Defendant be remanded to jail to await the further orders of this Court.

RECORDED: VOLUME 24, PAGE 35 JUDGMENT MINUTES 177TH DISTRICT COURT OF HARRIS COUNTY, TEXAS.

[fol.17]

DEFENDANT'S ORIGINAL MOTION FOR A NEW TRIAL
FILED: NOVEMBER 19, 1970

NO. 151,738

THE STATE OF TEXAS	X	IN THE CRIMINAL
	X	DISTRICT COURT,
VS.	X	177TH DISTRICT COURT
	X	HARRIS COUNTY, TEXAS
HARRY LEE WILLIAMS	X	NOVEMBER TERM, A.D. 1970

DEFENDANT'S ORIGINAL MOTION FOR NEW TRIAL

TO THE HONORABLE MIRON A. LOVE, JUDGE OF SAID COURT:

COMES NOW the Defendant in the above entitled and numbered cause and moves the Court to set aside its judgment and grant a new trial for the following grounds and reasons, to-wit:

I.

For the reason that the testimony clearly indicated that the witness, RAY NEATHERLIN, expected a fight. With such expectation he made no effort to call the Police or any law enforcement agency. Rather, he proceeded quickly, not even

taking time to put on a shirt, to the place where the Defendant was quietly waiting for his friend, MRS. KAY DILLON.

The witness, RAY NEATHERLIN, being a large, robust person weighing nearly two hundred (200) pounds, had a friend who, also taking no time to put on a shirt, went with the witness, RAY NEATHERLIN, to the area where the Defendant sat quietly talking to two ladies, and waited.

The friend and witness, though not taking time to put on a shirt, did hastily get his pistol, to back up his friend, witness RAY NEATHERLIN.

With such a stampede upon the Defendant, it would appear to a reasonable person that the Defendant could easily be in fear of his life. Under such fear, with malice to none, the Defendant could reasonably be expected to use whatever means were available to protect himself.

Being frail body, and certainly no physical match for the witness, RAY NEATHERLIN, the Defendant resorted to the only means available, a pocket knife, to protect and defend himself. Even with the aid and use of his pocket knife, the Defendant was [fol.18] given a severe beating by the witness, RAY NEATHERLIN, who struck and knocked down the Defendant SEVERAL times.

II.

For the reason that the Judgment of the Court is contrary to the law and evidence in the cause now pending before the Court in that, at its worst, the testimony could only show that the Defendant was guilty of some lesser included offense other than assault upon RAY NEATHERLIN with intent to murder him with malice. While it could be inferentially inferred from the testimony given by the witness, RAY NEATHERLIN, that the Defendant could

be guilty of simple assault, assault and battery, perhaps aggravated assault or even possibly assault to murder without malice, the law and the evidence are such that the Defendant could not have been guilty of assault upon RAY NEATHERLIN with intent to murder him and that such assault to murder was made with malice.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that his motion for a new trial be granted for any or each of the reasons stated above.

Respectfully submitted,

s/ Chester E. Darnell
CHESTER E. DARNELL
Darnell & Halden
711 Main Street
Suite 950
Houston, Texas 77002
225-9241

Attorney for Defendant

C E R T I F I C A T E

A copy of this Motion has been mailed or otherwise delivered to Assistant District Attorney JIM SKELTON at the Harris County District Attorney's office, Room 500, Criminal Courts Building, Houston, Texas 77002, this 19th day of November, 1970.

s/ Chester E. Darnell
CHESTER E. DARNELL
Attorney for Defendant

[fol.19]

THE STATE OF TEXAS : IN THE 177TH DISTRICT COURT OF HARRIS
VS. NO. 151738 : COUNTY, TEXAS
NOVEMBER TERM, A.D.
HARRY LEE WILLIAMS : 1970

BE IT REMEMBERED THAT on the 9th day of December, A.D. 1970, came on to be heard the Original motion of the Defendant, Harry Lee Williams, for a new trial in the above entitled and numbered cause; and appeared the parties, the State by her District Attorney and the Defendant, Harry Lee Williams, in person and by counsel, and the said motion and controversion of the State thereto, and evidence and the argument of counsel thereon having been heard by the Court, the Court is of the opinion that the said motion should be overruled and refused.

It is therefore CONSIDERED, ORDERED, and ADJUDGED by the Court that the said

motion for a new trial be refused and overruled, to which order and judgment of the Court the Defendant, Harry Lee Williams, excepts.

RECORDED: VOLUME 5, PAGE 170 GENERAL MINUTES 177th DISTRICT COURT OF HARRIS COUNTY, TEXAS.

[fol.20]

S E N T E N C E

NO. 151738 :

THE STATE OF TEXAS :

V. :DATE DECEMBER 9, 1970

HARRY LEE WILLIAMS :

This day this cause being again called, the State appeared by her District Attorney and the Defendant appeared in person and by Counsel, Chester E. Darnell, for the purpose of having sentence of the law pronounced in accordance with the verdict and the judgment rendered and entered against him on a former day of this term. And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, to pronounce sentence against him as follows, to wit:

"It is the order of the Court that the Defendant, Harry Lee Williams, who has been adjudged to be guilty of assault with intent to murder with malice aforethought, a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections for ten years, be delivered by the Sheriff of Harris County, Texas, immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Department of Corrections for not less than two years nor more than ten years in accordance with the [fol.21] provisions of law governing the Texas Department of Corrections."

The said Defendant was remanded to jail until said Sheriff can obey the directions of this sentence. This sentence to begin May 21, 1970.

To which action of the Court, the Defendant then and there, in open court, excepted and gave notice of appeal to the Court of Criminal Appeals of the State of Texas, Austin, Texas. And inasmuch as said Defendant has given notice of appeal herein, execution of the sentence is deferred to await the judgment and order of our Court of Criminal Appeals in this behalf.

Bail in the sum of $10,000.00 is allowed the defendant herein pending appeal.

RECORDED: VOLUME 24, PAGE 36 JUDGMENT MINUTES 177TH DISTRICT COURT OF HARRIS COUNTY, TEXAS.

[fol.30]

CAUSE NO. 151,738

THE STATE OF TEXAS	)	IN THE DISTRICT
	)	COURT OF HARRIS
	)	COUNTY, TEXAS
V.	)	177TH JUDICIAL
	)	DISTRICT, NOVEMBER
HARRY LEE WILLIAMS	)	TERM, A.D. 1970

VOIR DIRE OF JURY PANEL

[fols. 31-44] * * *

[fol.45]

MR. SKELTON: You have never served on any criminal juries in California, Florida, or anywhere else?

MR. STALLINGS: No, sir.

MR. SKELTON: Mr. Weaver, I notice you have not served on any juries.

MR. WEAVER: Yes, sir.

MR. SKELTON: You are a warehouse foreman. Prior to that --

MR. WEAVER: I was a field foreman for the same company.

MR. SKELTON: I presume you have never had any particular friend, acquaintances, charged with a crime, where they were accused of a crime of violence? You have never had a friend or loved one that was actually a victim of a crime of violence?

MR. WEAVER: No, sir.

MR. SKELTON: This defendant is sitting in jail clothes. I am assuming

he's been in jail to the time of this trial. You are not to take this into consideration. The fact a man is in jail clothes shouldn't make you feel he is guilty any more than if he were in street clothes.

[fol.46]

The second thing, oftentimes evidence will come out that a person has been in jail for seven months or eight months awaiting trial. By the same token, this should not be taken into consideration on your verdict, because you are supposed to go straight down the line, guilty or not guilty, and not let how a person is dressed influence your decision. Could you do that in this case?

MR. WEAVER: Yes, sir.

MR. SKELTON: Is it Mrs. McCalman?

MRS. McCALMAN: Yes, sir.

MR. SKELTON: You are a PBX receptionist?

MRS. McCALMAN: Right.

MR. SKELTON: You have never served on a jury?

MRS. McCALMAN: No, sir.

MR. SKELTON: How about your husband?

MRS. McCALMAN: Yes, sir.

MR. SKELTON: What type of case?

MRS. McCALMAN: Civil, I believe.

[fols. 47-51] * * *

[fol.52]

* * * * *

MR. BELL: Yes, sir.

MR. SKELTON: You have heard the questions I asked. I have gone over reasonable doubt, gone over the business of how the defendant was dressed, the fact he may or may not have been in the jail all this time. Would your answers by any different than the other jurors? Would you give us a fair trial as well as this defendant?

MR. BELL: Yes, sir.

MR. SKELTON: It just says "Executive for American" who?

MR. CRISPIN: Steel Building Company.

MR. SKELTON: You were born in Belguim. How long have you been over here?

MR. CRISPIN: Eighteen years.

MR. SKELTON: Have you ever served on a jury since you have been over here?

MR. CRISPIN: No.

MR. SKELTON: Thank you very much.

* * * * *

[fols.53-73] * * *

[fol.74]

* * * * *

EXAMINATION BY MR. DARNELL:

MR. DARNELL: I am Chester Darnell, the attorney for the defendant, Harry Lee Williams. Does anyone in this panel know me or know of me. I'm with the firm Darnell & Hall in Houston.

This is Harry Lee Williams. Does anyone recognize him?

I will go over some of the things that the prosecutor did and ask you a few questions.

As he stated, the burden of proving this man guilty rests strictly with the State. He's been charged, and as the Judge has stated, you are to presume him innocent until he is proven guilty.

I want to ask all of you the one general question, is there any person here

that feels they could not give this man a fair trial or could not after hearing evidence be fair to him, would you raise your hand, for any [fol.75] reason whether it's race, looks or something of that nature?

As you heard, he is in jail clothes. Would that affect anyone's opinion of him?

You are Mr. Stallings and you work for a computer company?

MR. STALLINGS: That's right.

MR. DARNELL: And, as I recall you have not served on a jury?

MR. STALLINGS: No, I haven't.

MR. DARNELL: Your wife is a teacher?

MR. STALLINGS: That's right.

* * * * *

[fol.102] CAUSE NO. 151,738

THE STATE OF TEXAS	X	IN THE DISTRICT
	X	COURT OF HARRIS
	X	COUNTY, TEXAS
V.	X	177TH JUDICIAL
	X	DISTRICT, NOVEMBER
HARRY LEE WILLIAMS	X	TERM, A.D. 1970

* * * * *

A P P E A R A N C E S:

For the State of Texas: Mr. Jim Skelton
Assistant District Attorney, Harris County, Texas

For the Defendant: Mr. Chester E. Darnell, Attorney at Law, Houston, Texas

* * * * *

BE IT REMEMBERED that upon this the 9th day of November, A.D. 1970, the above styled and numbered cause came for Trial before the Honorable Miron A. Love, Judge of the 177th District Court of Harris County, Texas, and a jury; and both the State and Defendant appearing in person and/or by Counsel, announced ready for trial; and all preliminary matters having been disposed of, a jury was duly

selected, empaneled and sworn, and proceedings had, the following facts were adduced in evidence, viz:

[fol.103]

THE COURT: Will the defendant stand and be arraigned.

(AT THIS TIME THE DEFENDANT IS ARRAIGNED:)

THE COURT: How do you plead on arraignment?

THE DEFENDANT: Not guilty, Your Honor.

THE COURT: All right, you may be seated.

Present the indictment to the jury.

(AT THIS TIME THE INDICTMENT IS PRESENTED TO THE JURY:)

THE COURT: Counsel, will you enter the plea of the defense.

MR. DARNELL: The defendant pleads not guilty, Your Honor.

THE COURT: All right. Because of the hour, members of the jury, we are

not going to give testimony [fol. 104] until 2:00 o'clock, after the noon recess.

Now, during any recess please recall the following instructions so that in case I have to excuse you from the court I won't have to reiterate them each time. But you are not to deliberate upon any of the testimony that's been presented before you until you have finally been charged by the Court to deliberate upon your verdict. You are not to permit anyone to discuss with you outside of this courtroom the fact that you are on this particular jury. If anyone approaches you for the purpose of discussing that, you should report that to the Court at your first opportunity.

Will you please be back in the court by 2:00 o'clock so that we can take the testimony beginning approximately at that hour. We will stand recessed at this time.

[fol.105] (NOON RECESS)

THE COURT: Are you ready to proceed now on the Harry Lee Williams case?

MR. SKELTON: The State is ready.

THE COURT: Bring the jury in.

(AT THIS TIME THE JURY IS RETURNED TO THE COURTROOM.)

THE COURT: Members of the jury, the delay was not caused by either of the lawyers in this case but by other matters the Court had before it that are unrelated to this case. But we are prepared to proceed now.

MR. DARNELL: Your Honor, the defendant would like to invoke the Rule.

THE COURT: Who is your first witness?

MR. SKELTON: Ray Neatherlin.

[fol.106]

THE COURT: The Rule has been invoked. This means the other witnesses must remain outside of the courtroom except while you are tesifying. You are not to discuss your testimony among yourselves or permit

anyone other than the lawyers to discuss it with you.

[fol.107]

TESTIMONY OF RAY NEATHERLIN,

WHEREUPON THE SAID RAY NEATHERLIN WAS CALLED AS A WITNESS BY THE STATE AND, HAVING FIRST BEEN DULY SWORN AND CAUTIONED ON HIS OATH, ASSUMED THE WITNESS STAND AND UPON EXAMINATION, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q State your name, please, sir.

A Ray Neatherlin.

Q Mr. Neatherlin, where do you work?

A Self-employed.

Q What do you do, please, sir?

A I move houses and also have some apartments.

Q How long have you been in this line of business?

A Twenty-five years.

Q You mentioned you had some apart-

ments.

A I have some apartments.

Q How long have you had these apartments?

A About two years.

[fol.108]

Q Where are they located?

A 619 East 7th.

Q Is that the area we commonly call the Heights?

A Correct.

Q Where do you live?

A I live there in the apartment project.

Q Do you manage them as owner as such?

A Yes, sir.

Q Were you living there on the 20th day of May, 1970?

A Yes, sir.

Q Do you know this defendant, Mr. Harry Lee Williams?

A Yes, sir.

Q Would you point him out for the benefit of the Judge and jury, please?

A He's the fellow with the white uniform on.

Q How long have you known Mr. Williams?

A Oh, he moved there in the apartment, stayed about three months.

Q Was this three months prior to the 20th day of May?

A Yes, sir.

Q So I presume about April, somewhere around March or April he moved in, correct?

[fol.109]

A Somewhere along there.

Q How long did he stay in your apartments?

A Approximately three months.

Q Then he left, I presume?

A Left, yes, sir.

Q Did you have an occasion to see him after he left, see him the 20th day of May, 1970?

A I didn't see him until the day he came back over, the time we had the little run-in, I had the hot checks on him.

Q About what time of day was it?

A It was late in the afternoon, I believe about 8:30 probably, something like that.

Q Was it daylight or dark at this time?

A Daylight.

Q Mr. Neatherlin, I think if you will pull this blackboard around, if you draw a diagram of the apartment your story will be a little more understandable.

If you would draw the streets where your apartments are located and the buildings -- have to make them pretty big so the jury can see them.

Now, Oxford runs north and south, doesn't it?

[fol.110]

A Yes, sir.

Q So north would be up to your right?

A North, yes, sir. East 7th Street dead ends right into this project. I will just draw a kind of picture of the property. These apartments start like this.

Q Are those separate buildings?

A Yes, sir.

Q How many apartments in each building?

A Four apartments in each one.

Q Are they upstairs and downstairs?

A All downstairs. Now, then, the apartment that I live in is here.

Q Now, which way does the front door face? Does it face down toward the bottom of the blackboard?

A Toward the east.

Q You faced east then, correct?

A I faced east.

Q You mentioned on May 20th you had an occasion to see this defendant prior to then. Had somebody been over to your apartment?

A yes, sir.

Q Who was that, please sir?

A Some little lady, a little girl came over to [fol.111] tell Mrs. Kay Tolley --

Q Was Mrs. Kay Tolley a tenant?

A Yes, sir.

Q Where did Mrs. Tolley live?

A She lived in the second door of this apartment right here.

Q Where is Mrs. Kay Tolley now?

A I believe she's in Kansas or someplace now. I forget what state.

Q She has moved from the apartment area and out of the state?

A yes, sir.

Q When did she move, do you remember?

A About three or four weeks after this little incident happened.

Q You said Mrs. Tolley was over to your apartment?

A Yes, sir.

Q What was she doing over there?

A She was over there to pay her rent, I believe.

Q Was she paying this to you or your wife?

A My wife.

Q Where were you when she was paying the rent?

A I hadn't got in from work.

Q Did you come in from work?

A Yes, sir, while she was still there.

[fol.112]

Q What did you start to do?

A I started to take a shower.

Q You said some little girl came over. Do you know her name?

A I don't know.

Q Do you know where the little girl lives?

A No, sir.

Q Did she live in the apartment area?

A I suppose she did.

Q What did she report to Mrs. Tolley?

A She told her there was someone over there to see her.

Q Did she say who?

A No, she didn't know who.

Q Could you hear all of this all this time?

A Yes, sir.

Q What did you do when the little girl reported to Mrs. Tolley that somebody was over there to see her?

A Mrs. Tolley asked the little girl who it was. She said, "I don't know." She said, "Was it a man?" She said, "Yes". She said, "Well, he just came back to give trouble."

Q Did you know who they were talking about?

A Yes.

[fol.113]

Q How did you know who they were talking about?

A She said, "That is Mr. Williams."

Q Are you talking about the defendant over here, Mr. Williams?

A Yes, sir.

Q And you knew that is who they were talking about?

A Yes, sir.

Q What did you do when you heard Mr. Williams was back in the area?

A Well, when I walked in and she was there, she asked me if I had seen him. I said, "No, I haven't seen him."

Q That is Mrs. Tolley asked you that?

A Yes.

Q Okay.

A So she said to the little girl, she said, "Well, that's Mr. Williams." She told my wife, "Well, he just come back to give trouble."

Q Had he been over there before that you know of bothering Mrs. Tolley?

A Not that I know of.

Q What did you do after this, what happened next?

A Well, when she started out I said, "Well, wait a minute, I will go down there with you to see if I can get him to pay off this hot checks."

[fol.114]

Q What checks are you talking about?

A A couple of hot checks I had on him for rent.

Q Is that the reason he moved out of the apartment?

A I guess so.

Q After you left show us where you walked and where you went to.

A I come out this door and walked right around this direction and he was sitting on the porch right here.

Q Who is "he"? You mean the defendant?

A Mr. Williams.

Q Who lives over in that house?

A Jean Owens. The man that lived there was sitting in a chair here and some

other people and he was sitting -- he was sitting on the porch here and these people were sitting out in the yard and when I walked around he saw me and Mrs. Tolley around the corner here and he got up and met us right along here.

Q Draw an "X" where you met.

A Right here.

Q You can have a chair now if you would.

Now, you mentioned some folks by [fol.115] the name of Owens. Are those four buildings still a part of your apartment area?

A Yes, sir.

Q And did the Owens rent from you?

A Yes, sir.

Q So all those buildings, I assume all of those up there are your apartments?

A That is correct.

Q Now, what first occurred when you and Mrs. Tolley and this defendant met out there? What was the first thing you said to this defendant, Mr. Williams?

A I believe I asked him to pay off his hot checks.

Q Did he say helo to you to begin with, or was there any words or greetings exchanged?

A No, sir.

Q Did he say hello to Mrs. Tolley?

A I believe so.

Q Did you have the checks with you at that time?

A No, sir.

Q Did you tell him about the checks?

A Yes.

Q What did he say when you asked him about the checks.

A Well, he wasn't going to pay them.

[fol.116]

Q What did he say?

A Said they weren't his checks.

Q What happened next?

A I asked him about leaving my apartments. See, he went off and left my apartment in a terrible mess.

Q About how much longer was this -- we are talking about May 20th. How long had it been since he had moved out?

A I'd say a couple of months probably, or maybe a little longer, two or three months.

Q What did he say when you asked about the apartment being in such a bad shape?

A He said he paid to have somebody clean it up.

Q What next occurred?

A I told him that he didn't do that, that I had to have it cleaned.

Q What happened after this?

A Well, I think he said "That is a lie" or something and then it started from there. I don't remember exactly.

Q You said it started from there. What are you referring to?

A That is when he cut me.

Q During this discussion were both of you getting [fol.117] angry?

A I didn't understand you.

Q Were both of you getting angry during this discussion?

A I think he was angry to start with.

Q Did he act belligerent when he first walked up to you?

A Yes, sir.

Q You said he cut you. Did you actually see him cut you with anything? Did you see a knife in his hand?

A No, sir. I never saw a knife.

Q How did he cut you?

A With a pocketknife.

Q Where?

A He cut my throat the first lick I believe.

Q What side did he cut you?

A On the left side, fourteen stitches.

Q Did he slap at you or how did he do it?

A I thought he was putting his hand to me; that's when he cut me.

Q Prior to this time -- you said he cut your throat prior to this time. Had you made a gesture toward him?

A No, sir.

[fol.118]

Q Had he grabbed at you prior to this time?

A He grabbed at me.

Q I'm talking about prior to the time he cut your throat.

A Not that I know of.

Q Did you threaten to hit him?

A No, sir.

Q Did you have your fist clinched?

A No, sir.

Q What happened after he cut you across the left side of the neck?

A That's when he reached for me and cut me; that's when I hit him.

Q Did you realize you had been cut at this time?

A I didn't know it, no, sir.

Q Where did you hit him?

A I don't know. In the face somewhere.

Q What happened then? Did you get in a fight after this?

A Yes. He fell on the ground and I stood back like a gentleman and let him get up. Every time he'd get up he was cutting at me and I didn't know it.

Q How many times did he cut you?

A He stabbed me one time, cut me --

[fol.119]

Q You said he cut you once on the neck, fourteen stitches?

A Yes, sir.

Q Where were you stabbed?

A In the chest.

Q How deep was that, if you know?

A The doctor said it was all the way, the length of that knife blade.

Q You were cut where else other than there?

A Well, on my left, right over my heart.

Q How long was that?

A Three different times on the heart.

Q You were cut three times over the heart?

A Yes, sir.

Q About how long were these cuts?

A About twelve inches long.

Q All three of them?

A Yes, sir.

Q Where else were you cut?

A In the stomach.

Q How long was that one?

A Oh, about eight or ten inches.

Q Do you know how many total stitches it took to get you finally repaired?

A Fifty-eight, I believe.

[fol.120]

Q Were you taken to the hospital after this?

A Yes, sir.

Q Do you know what condition you were in at that time, at least what they commonly term serious, critical or fair?

A Critical.

Q And how long were you in the hospital?

A From Wednesday night until Saturday morning.

Q And I assume that you eventually recovered all right since that period of time?

A Well, fair. I'm not in too good of shape.

Q And I assume all this occurred here in Harris County, Texas, did it not?

A Yes, sir.

Q Did you have any type of weapon on you at all?

A Not even a pocketknife.

Q Now, was there anybody else present other than Mrs. Tolley, who either went to Ohio or Kansas, and Mrs. Owens who lived across the street, and this defendant, Harry Lee Williams, was anybody else present?

A There was two or three people sitting in the yard and I don't know who they all were.

Q Was one of the tenants also with you a gentleman by the name of --

[fol.121]

A Bill Stacy.

Q Where does Bill Stacy live?

A He lives directly across from where I live there in the apartment.

Q You mean right across the sidewalk?

A On the end apartment, right in the building right across in front of me.

Q Are you talking about right over here?

A Yes, sir.

Q So this would be where Stacy lived, correct?

A That is correct.

Q Now, when did you first realize that you had been cut?

A After Stacy said, "Look out, he's got a knife".

Q You heard him say that?

A He said that.

Q Did you ever see the knife up until that time?

A I never saw the knife, no, sir.

Q Was he hitting you with an open hand, fist, or how?

A No, he was just cutting me and he kept trying to clinch me, get ahold of me.

Q What did you do after you realized you had been cut up so badly, what did you do then?

A Well, I looked down and saw, looked like my [fol.122] insides hanging out. I took my hand, pushed them back in, sort of bent over, the blood was running so bad I knew I couldn't last long if I didn't get someplace. I turned, walked back to my apartment, sat down on the porch. They give me a towel. I put this towel over it and held it to my stomach and the guy that lived back behind the apartment backed his car up there and took me to the Heights Hospital.

Q Were you cut that deep where your intestines were actually hanging out?

A I don't know whether intestines were hanging out, but it looked to me like it was.

Q Something was?

A Yes. I knew something was hanging out there.

MR. SKELTON: Pass the witness.

[fol.123]

CROSS EXAMINATION

QUESTIONS BY MR. DARNELL:

Q You stated, I believe, that he cut you on the neck?

A Yes, sir.

Q And did you state that when you were cut you did not know it at the time?

A I didn't actually feel it, no, sir.

Q You stated you did not see a knife in his hand at any time?

A No, sir.

Q Is it possible he could have just moved his hand by at that time and not have cut at that particular time?

A If he did, how come I was cut?

Q But could you have been cut there at a later period instead of that first time you said his hand went by?

A I don't know about that.

Q But you don't know definitely that he did cut you at that moment?

A I never did know when he cut me at any moment. [fol. 124] I never did feel it.

Q But after his hand went by your neck you hit him and knocked him down, is that correct?

A That is correct.

Q And did you not see a knife at that time, and did you not know you were cut?

A I never saw the knife at any time.

Q After you knocked him down he got up?

A Yes, sir.

Q And you knocked him down again?

A He got up and run back toward me.

Q Were you angry when you knocked him down?

A Yes, sir.

Q What made you angry?

A Wouldn't you be?

A Well, it depends. I'm asking you whether you were angry.

A I said yes.

Q And prior to knocking him down the only thing that he had done as far as moving toward you or anything was --

A Hit me across the neck.

Q Well, did he hit you or did you say he cut -- his arm went by, you said you did not feel anything?

[fol.125]

A Well, I felt it when he hit my neck but I didn't know I was cut.

Q Whatever happened, it was no pain or no hurt to you at that time?

A No, sir.

Q Did you think you hurt him when you knocked him down?

A I didn't have any idea.

Q Did you observe during this scuffle whether this defendant had any teeth knocked out?

A No, sir, he didn't have any teeth knocked out.

Q Did anybody assist you in this scuffle at anytime?

A No, sir.

Q What is your weight?

A Sir?

Q What is your weight?

A Two hundred pounds.

Q Did the defendant say anything during the scuffle or any words that you recall?

A He just called me a liar.

Q Well, that was at the time you asked him about some checks, is that correct?

A That is correct.

Q What disposition have you made of those checks as [fol.126] of this time?

A Well, this lady paid them off that he came over there to see. Her husband is the one that gave the checks.

Q Her husband gave the checks?

A To him and he gave them to my wife for his rent.

Q But then I gather from your statement he was not the original maker or original signer of that check?

A No, sir. He didn't sign the check. He was smarter than that.

Q But you never saw any weapon on this defendant at any time?

A No, sir.

Q Did you see any weapon, a knife, a pistol or anything on anyone in this general area where you were?

A No, sir.

Q Did you hear anyone make a remark as to a pistol or knife or anything?

A I heard Stacy when he said, "Watch out, he's got a knife".

Q And there were two or three people in the yard other than Mr. Stacy?

[fol.127]

A That is correct.

Q You do not know their names or who they were?

A Owens was one that I know of.

Q What is his name?

A Well, her name is Jean Owens.

Q Was any of those people of the male sex other than Jean Owens, she would be female, I assume?

A I didn't see anybody, no, sir.

Q Were there two or three people there, women?

A Yes, sir.

Q All of them?

A All of them I think, I'm not positive.

Q How many times did you knock the defendant down, do you recall?

A I think about three times.

Q Did you do anything to him other than knock him down?

A That is all.

Q Push him ever so slightly?

A No, sir.

Q Shove him in any way?

A Not that I remember, no, sir.

Q Did you use any part of your body other than your fist in contact with him?

A Not that I know of.

[fol.128]

Q Is it possible you could have shoved him with your knee?

A No, sir.

MR. DARNELL: I have no more questions.

[fol.129]

REDIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q How old a man are you, please, sir?

A Fifty-eight.

Q And you said you saw the defendant on that date. Was he about the same size as he is now?

A It looks to me like he's lost weight.

Q How big of a man was he on this date?

A He was almost as large a man as I was. I'd say he weighed a hundred eighty.

Q You mentioned a man by the name of Bill Stacy. He walked around the house over to Mrs. Tolley's apartment with you. Where did he come from if you know?

A He came up from behind me as I walked around.

Q Now, you mentioned that when you got over there that he was sitting on the porch. Did he approach you, or did you approach him? How did this come about?

A He got up and met me.

Q Then he came over towards you?

A Yes, sir.

(fol. 130)

Q And all this was on your property, this squabble, the fight, the whole thing?

A Yes, sir.

Q And the way I understand it, that you'd hit him, he'd get back up and slash at you, is that correct?

A I imagine.

Q Did you ever kick him when he was down on the ground or get on top of him, anything like that?

A No, sir.

Q There wasn't a bunch of you ganged up to whip him, was there?

A No, sir. I had no idea it was going to be anything like that.

Q Were you anticipating any trouble when you walked out there with Mrs. Tolley?

A Kind of knowing him, kind of knowing his character, I figured that there might be but I didn't know.

Q Did you have a gun at your apartment?

A Yes, sir.

Q Do you keep one there at all times?

A Yes, sir.

Q Do you have anybody employed at your apartments that's in charge of security like some of these (fol. 131) apartment houses have?

A No, sir, I don't have any security officers. I've got two or three of them that carry guns around there, that kind of protect the property.

Q You look upon them to kind of help you out?

A Yes, sir.

Q Did you have a gun there that day on May 20th?

A I had a gun in my apartment.

Q Did you take it with you?

A No, sir.

Q Why didn't you?

A Well, I didn't think about it being this kind of trouble.

Q So I'm assuming that if you are expecting this kind of trouble, you would have taken your gun?

A I certainly would have.

Q If you had gone out there with the intent to fight him would you have taken that gun?

A I sure would, or something. I wouldn't have went bare-handed without my shirt on.

Q Were you without your shirt?

A Without my shirt, yes, sir.

Q You mentioned, I believe, that you didn't feel any of those cuts?

A No, sir.

(fol. 132)

Q Do you know about how many cuts you got all told?

A Let's see, I got about six I believe and one stab wound.

Q You say fifty-eight stiches, is that what you said?

A Yes, sir, I believe that is correct.

Q You didn't feel any of them then?

A No, sir.

MR. SKELTON: I will pass the witness.

(fol. 133)

RECROSS EXAMINATION

QUESTIONS BY MR. DARNELL:

Q You stated you have a gun. What type gun do you have?

A .38 snub-nosed Smith & Wesson.

Q The security guards that were mentioned, do they live in this apartment complex?

A Yes, sir.

Q Are they on duty around the clock or at night or --

A Just whenever they are there, to help watch out for the thugs and thieves.

Q They are not full-time employees or regular employees then?

A No, sir.

Q Are they employed as security guards at some other place of business?

A No, sir, not that I know of.

Q Well, I'm trying to clear up why they are considered as security guards.

A Well, they just help watch out for the property and anything that goes on, does it voluntarily because they live there.

(fol. 134)

Q In other words, they have no official capacity as a guard, it's that they live there?

A They live there, yes, sir.

Q Do you have weapons?

A Yes, sir.

Q What type weapons did they have, do you know?

A I don't know what all type they have.

Q How many security guards are there?

A Well, there's not any security guards.

Q How many people?

A How many?

Q How many people would you consider help look after the property?

A Well, I think that there's several around there that do the same thing, I don't know just how many.

Q I don't mean to be repeating, I mean the security guards was used and I was trying to clear that up. Now, as I recall, you stated that they had weapons. Do you know how many people or do you have any idea how many people have weapons in this apartment?

A No, sir.

Q But there are some that do?

A Yes, sir.

(fol. 135)

Q Bill Stacy is a tenant in the project?

A That is correct.

Q Does he have a pistol?

A Yes, sir.

Q Do you know what type it is?

A No, sir, I don't.

Q Have you ever seen his pistol?

A Well, I believe I have seen it, I'm pretty sure.

MR. DARNELL: I have no further questions at this time.

(fol. 136)

FURTHER REDIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q As I understand, you don't have security officers as such, but there are tenants that assist you from time to time in overseeing your property, is that correct?

A That is correct?

MR. SKELTON: I have no further questions of this witness.

We call Mr. Bill Stacy.

(fol. 137)

TESTIMONY OF BILLY W. STACY,

WHEREUPON THE SAID BILLY W. STACY WAS CALLED AS A WITNESS BY THE STATE AND, HAVING FIRST BEEN DULY SWORN AND CAUTIONED ON HIS OATH, ASSUMED THE WITNESS STAND AND UPON EXAMINATION, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q State your name, please, sir.

A Billy W. Stacy.

Q Mr. Stacy, where do you work?

A General Electric.

Q What do you do for G.E.?

A I work in the accounting office.

Q How long have you worked for them?

A Right at five years.

Q Where do you live?

A 619 E. 7th, Apartment 17.

Q Is there a particular name for these apartments?

A Studemont Apartments.

(fol. 138)

Q Those are the ones named by Mr. Neatherlin?

A Ray Neatherlin.

Q Were you living over in that area on the 20th day of May, 1970?

A Yes, sir, I was.

Q What, if anything, unusual happened that evening?

A Well, that's the evening, I believe we are speaking of, Mr. Neatherlin got cut, a man cut him with a knife.

Q Did you have an occasion to see Mr. Neatherlin prior to this cutting?

A Yes, sir. I was sitting on the front porch with my wife when Ray came home from work.

Q About what time was that, if you recall?

A It was about dark, I'd say between 8:00 -- 7:00 and 8:30 roughly.

Q Did you live across the way from Mr. Neatherlin?

A Right.

Q Here is a diagram over here. If you would, look at it, please, sir. Assuming this is Mr. Neatherlin's house, I assume this would be your apartment?

A That is correct.

Q You said you were on the front porch?

A Right.

(fol. 139)

Q You were out there by yourself?

A Wife and next door neighbor and his wife.

Q You say he came home from work?

A Correct.

Q What happened after he came home from work?

A Well, I don't know any of the conversations that was going on in his apartment, but he came out of his house when he came home. He had been working all day. He was sweaty and the clothes were dirty. He came outside of his home in a pair of khaki pants and without a shirt. He was getting ready to take a shower. He looked over towards me, said, "Come on, Stacy, come with me a minute."

Q About how far is it from your house to his front porch?

A When he spoke to me, he was standing on the sidewalk in between the two rows of apartments, which would be about ten feet from my front porch, I imagine.

Q What did he say?

A He said, "Come on, Stacy, come on with me a few minutes." That's not uncommon. That's a new apartment. He shows me things that's going on from time to time.

(fol. 140)

Q Who was with him, if anybody?

A No one.

Q What happened after he told you to come with him?

A I got up, went inside my house and got a pistol.

Q Why did you do that?

A Something about his tone of voice. I have never been hostile with a gun or anything, just something in his tone of voice I knew he expected trouble. There's been occasions of people messing with people's cars.

Q Have you assisted him from time to time when things like this would

occur?

A Yes, sir. During the late hours of night I try to keep the eye on our cars. I'm one of about five men in the apartment to do this.

Q You went, got your pistol?

A Yes, sir.

Q What type?

A Browning .38 automatic.

Q What did you do with it?

A Put it behind my back. I don't believe I had a shirt on either.

Q Did you stick it in your --

A Stuck it in my back.

(fol. 141)

Q Did Mr. Neatherlin wait for you?

A No. He went towards the end of the apartment to go around where this disturbance was at. I had to run to catch up.

Q When you arrived, what did you see, what was going on?

A Looked like Ray was -- drawing some X's there, the second row of apartments at the end of the first row of apartments, I more or less, caught up with him.

Q The first row?

A I'd say the row towards East 7th Street.

Q Here, or where?

A Right there. I had caught up with him at that location.

Q Now, were you walking beside him.

A Behind him, a step or two behind him.

Q What happened? You followed him up here?

A Yes, sir.

Q What happened after you folks arrived up here?

A Well, he approached the gentleman sitting over there in the uniform and I was standing close enough to hear them, yet I didn't want to get involved.

Q Where were you standing? Were you past this (fol. 142) building, about the middle or --

A In the second row of apartments. We made the turn there and walked down the sidewalk and it would be the first apartment on the left is where Ray was addressing the gentleman.

Q Where were you standing?

A To Ray's right, a step to the rear, maybe.

Q About how far back from Ray were you?

A At that time maybe three feet behind him.

Q Did you still have your gun stuck in the back of your belt?

A Yes, sir.

Q You say this gentleman approached Ray?

A Yes, sir.

Q And did you take part in the argument?

A No, none whatsoever.

Q What did you hear spoken or said between Mr. Neatherlin and --

A This is -- I heard this later after Ray and his wife explained this to me, the man had previously lived in this apartment project and Ray had asked him to move on account of some --

Q Let's don't go into that.

A Anyway, Ray Neatherlin told him he didn't want (fol. 143) him on his property, that he had a couple of bad checks on him. He said, "Either come over and pay your rent of get off my property."

Q What happened after he asked him to get off the property?

A He either jumped at Ray, put his hand on his neck or something. I was behind him. I seen him approach Ray, or he called him a vulgar name and this is when the fight started actually.

Q Who grabbed who?

A He grabbed Mr. Neatherlin.

Q Did you see where he hit him?

A I'd say around the neck.

Q You say a fight ensued?

A Right. At that time Ray backed up or he called Ray a name and Ray hit him.

Q This was after the defendant swung at his neck?

A Yes, sir.

Q Then they had a regular fight I suppose?

A Yes, sir.

Q How many times did you see Mr. Neatherlin hit this defendant, Harry Williams?

A I couldn't tell you how many. I don't know how long the fight lasted before --

Q What was Mr. Williams doing all of this time?

(fol. 144)

A He was getting hit. I didn't see him do any swinging back, I mean not with his clinched fist. He was getting very close to Mr. Neatherlin.

Ray would hit him and he'd still stay up there close to him. Like I say, Mr. Neatherlin's back was to me. I couldn't actually see his face, chest or mid section or anything. I did at one time notice how the defendant had his arm stiff with his finger extended and I had seen this one time before in Vietnam and I suspected then he had a knife.

Q What made you think he had a knife?

A I seen a sergeant cut up a man in Vietnam like this and it came out in the trial he was an experienced knife fighter.

Q Did you ever see a knife?

A That is when I pulled my gun out of my back, I said, "Ray, look out. I think he's got a knife." Then Ray jumped out of the way and I saw a

partial piece of the blade in his hand.

MR. SKELTON: We'd like to have this marked State's Exhibit No. 1 for identification purposes.

(STATE'S EXHIBIT NO. 1 MARKED [fol. 145] FOR IDENTIFICATION PURPOSES)

Q (By Mr. Skelton) I hand you what we have marked for identification purposes as State's Exhibit No. 1 and ask you to show the jury and me how he was holding the knife when you first noticed it.

A When I first noticed it in his hand with his finger over it?

Q Like that?

A Yes, sir.

Q You say that is when he --

A He was standing close, I believe, for the purpose of cutting Ray again, time after time after time. I remember at this trial in Vietnam they said all knife fighters hold their knife this way.

MR. DARNELL: Your Honor, he's not --

THE COURT: Testify as to what you saw and heard on this occasion.

A This knife -- I have had two years karate. The knife is held in this manner for two reasons, to keep it away from any eyewitnesses and in hopes your opponent won't know you are cutting him.

[fol. 146]

Q After you saw the knife, what did you do then?

A I pulled my gun out and said, "Look out, I think he's got a knife."

Q What did Ray do?

A He moved back out of the way.

Q Did he turn and face you?

A At that time I circled and got in between the two of them -- not between them, but facing the defendant so I could see Ray also.

Q What did you see when you saw Ray?

A He said he's cut all to pieces. "My God, he's already cut me."

Q Was this in his face?

A Cut him in the heart, his mid section was open, his intestines were actually hanging out, cut him behind and inside of the leg, cut him behind the neck, cut him under the neck, cut

cut him under the heart, cut him under the heart, there was a knife going straight in his chest; I'd consider that a man cut all to pieces.

Q After you saw this, what did you do with this defendant?

A Well, I put my gun in his direction, I told him to drop the knife.

[fol. 147]

Q What did he do?

A He stood there, looked at me a moment. I pulled my gun off safety and told him once more to drop the knife or I'd shoot him.

Q About how far away were you from the defendant when he dropped the knife?

A Approximately three feet.

Q After this defendant, Mr. Williams, dropped the knife, what did you do then?

A I kicked the knife out of the way and Ray said, "Stacy, get me an ambulance,

I'm getting weak." He was bleeding quite a bit, so I had to -- I made sure that he didn't pick the knife up again. He backed up toward the parking lot. I wanted to make sure he didn't pick up the knife again and come at my back. I didn't care so long as he left the scene or left me alone. I wanted to get Ray to the hospital.

Q Did you ever see the knife again after that?

A No.

Q Who was present out there when all this occurred?

A At the time we walked over I did recall seeing a man and a woman on their front porch; I believe two or three ladies and one man that I happen to know in the apartment.

[fol. 148]

Q And did you later see Mr. Neatherlin at the hospital?

A Yes, sir, I did.

MR. SKELTON: I will pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. DARNELL:

Q You stated that when you left your apartment you took your gun with you, put it behind you, is that correct?

A That is correct.

Q Did you know Mr. Williams prior to that time?

A Never saw him before in my life.

Q And not knowing him, you go in and get a pistol to take with you. Is that a normal thing for you to do?

A I believe it would depend on the circumstances.

Q You walked behind Mr. Neatherlin for the entire [fol. 149] distance from the time you left his apartment until you got to where Mr. Williams was?

A To his right, right rear, maybe a step or half a step. I wasn't shadowed behind his image.

Q You said that this defendant put his hand on the neck of Mr. Neatherlin, is that correct?

A Well, it was in the general area of the neck. You are speaking of the actual location I was behind Ray? The only thing I was interested in was nobody else jumped in or if the defendant had somebody else with him I wanted to be sure nobody else jumped on Mr. Neatherlin. And he approached him in that area. I don't

know if it was his neck. I believe, if I remember right, it was.

Q But at that time that occurred there seemed to be no damage done to Mr. Neatherlin, is that correct?

A If it had of been, I couldn't have seen it from the rear.

Q Did Mr. Neatherlin seem to weave, stagger or --

A I don't believe I was judging his movements.

Q But immediately after this movement Mr. Neatherlin knocks the defendant down to the ground?

A That is correct.

[fol. 150]

Q And you stated he knocked him down several times?

A No, I didn't state that. I said he knocked him down once.

Q Did he knock him down several times?

A Yes, he did.

Q Did he hit him with his knee?

A Did Mr. --

Q Did Mr. Neatherlin hit him with his knee?

A No, he didn't.

Q Did he shove him or push him?

A At the time he was down on the ground?

Q At any time.

A Possibly. I don't understand what you mean by shoving or pushing. They was having a fight.

Q Well, in a fight there's normally shoving and pushing?

A I guess if you don't close your fist it is.

Q But they were scuffling a considerable period, moving around?

A That is correct.

Q How long a period of time did this scuffle last?

A I'd say roughly three to four minutes.

Q And you were standing behind Mr. Neatherlin during the entire scuffle?

[fol. 151]

A That is correct.

Q Had this pistol with you during that entire time?

A That is correct.

Q Was there any person there that could have seen that pistol?

A I don't believe so.

Q Did you state you had no shirt on?

A That is correct. I don't believe there was anybody behind me.

Q But it is possible somebody could have seen the pistol?

A Not anybody in front of me, no, sir.

Q Somebody behind you could?

A Possibly.

Q When did you remove that pistol?

A When I saw the knife.

Q Did you show that pistol at any time prior to then?

A No, sir, had no reason to.

Q But it was in the belt of your trousers?

A Yes, sir.

Q It was not covered by a shirt or anything?

A No, sir, I don't believe I had a shirt on. No, sir.

Q Were these gentlemen cursing each other or [fol. 152] fussing at each other?

A He'd called Mr. Neatherlin a vulgar name, yes, sir.

Q At the time Mr. Neatherlin stated he

had a check on him, is that when it occurred?

A I believe that is correct. Like I said, that was their business, that was no concern of mine and it was a personal argument as far as I felt.

Q But your going along was to see that Mr. Neatherlin was not hurt or injured?

A Well, at the time I went with Mr. Neatherlin I didn't even know why we were going. Once I realized there was a man to man argument going to take place, my only concern was nobody else jumped in on top of Mr. Neatherlin.

Q Is Mr. Neatherlin as large as this gentleman is?

A I'd say yes.

Q But you were concerned that no one would jump in on --

A That is correct. No one other than the gentleman sitting by you. I felt pretty sure he could handle himself against him.

Q So you must have been anticipating a fight then?

A At the time I saw a fight I didn't have to anticipate anything. I realized there was a [fol. 153] fight going on, yes.

Q But did you state you went along to see that no one else jumped on Mr. Neatherlin?

A I said I went along with Mr. Neatherlin. I didn't know why he asked me to go along with him. At that time they commenced fighting, all I wanted was for nobody to jump on them, to make it a fair fight.

Q No other persons interfered with this fight, it was between the two of them as far as this scuffle?

A That is correct.

Q Besides yourself stopping it?

A I stopped it, right.

MR. DARNELL: I have no other questions at this time.

[fol.154]

REDIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q Mr. Stacy, you stated you saw this defendant approach Mr. Neatherlin and slash or hit at his neck. You didn't notice Mr. Neatherlin stagger at that point?

A No, sir.

Q During this fight, did you ever notice him stagger or weave?

A No, sir. I wasn't really concerned about his body movements. I never once thought a man of his age would resort to a knife.

Q I'm assuming you didn't even know he had been cut?

A No, sir. I was behind and I couldn't see.

Q So there was nothing from the back of Mr. Neatherlin to indicate when he had got cut, right?

A Right. I didn't notice anything from his rear. I didn't notice any blood on his back or anything. I didn't know he was cut until I stopped the fight and Ray asked me to get him to an ambulance, he was weak at that time and he was weaving.

[fol.155]

Q This was after the fight?

A That's after I pulled the gun and stopped the fight.

MR. SKELTON: I have no further questions.

MR. DARNELL: I have no further questions.

[fol.156]

TESTIMONY OF F. G. BLACK,

WHEREUPON THE SAID F. G. BLACK WAS CALLED AS A WITNESS BY THE STATE AND HAVING FIRST BEEN DULY SWORN AND CAUTIONED ON HIS OATH, ASSUMED THE WITNESS STAND AND UPON EXAMINATION, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q State your name, please, sir.

A F. G. Black.

Q Where do you work?

A Police Officer, City of Houston.

Q How long have you been a police officer?

A Four years.

Q Do you work any special department or division?

A I work radio patrol, evening shift.

Q I presume that is the division that rides around and takes calls on com-

plaints and things of this nature, is that correct?

A Yes, sir.

[fol.157]

Q Were you working in that division back on the 20th day of May, 1970? Did you have an occasion to go out in the area of 7th Street where these apartments are located?

A Yes, sir.

Q What time did you receive the call to go out there?

A Approximately 8:00/8:30.

Q At nighttime?

A Yes, sir.

Q What, if anything, did you find when you arrived at the apartments?

A I found the complainant in this case, Mr. Neatherlin, I believe they were just fixing to take him to the doctor.

Q Do you recall where he was when you arrived?

A They were loading him in the car.

Q What did he look like?

A He had several lacerations on him.

Q Did you have an occasion to talk to him then?

A No, sir, I didn't talk to him.

Q After you saw Mr. Neatherlin, what did you do next?

A Took as much information as I could at the scene, from there we went to the hospital to make a follow-up investigation at the hospital.

[fol.158]

Q Did you find out what condition Mr. Neatherlin was in at the hospital?

A Well, when I got to the hospital he was being treated for several large lacerations, I presume. I'm not a doctor, but it looked to me like it was a critical condition.

Q After you left the hospital where did you go then?

A We went to the Admiral Motel on the corner of Airline and North Main.

Q I believe Airline runs into North Main at an angle there?

A Yes, sir. It's on the west side of North Main, at the intersection of North Main.

Q Why did you go there?

A We received information that possibly the suspect in this case was living there.

Q You are talking about Harry Lee Williams?

A Yes, sir.

Q This is information you got I assume talking to people at the scene?

A Yes, sir.

Q Did you arrest Harry Lee Williams at that address?

A Yes, sir, later.

[fol.159]

Q About how much later was it?

A Approximately an hour/hour and a half.

Q Who was working with you that night? Who was your partner?

A E. K. Syphrett.

Q Did you arrest this defendant out there at the motel?

A Yes, sir.

Q I hand you what we have marked for identification purposes as State's Exhibit No. 1 and ask you to examine it, please.

Have you ever seen that knife before?

A Yes, sir. It's the knife we took off Mr. Williams that night.

Q How do you know it's the same knife?

A Because I put my initials up on the front part of it, right here.

Q Those are your initials there?

A Yes, sir.

Q Where did you get the knife?

A Out of his pants' pocket.

Q Was this after you made the arrest?

A Yes, sir.

MR. SKELTON: At this time the [fol. 160] State would offer into evidence State's Exhibit No. 1.

MR. DARNELL: We have no objection, Your Honor.

THE COURT: All right, it will be received.

(STATE'S EXHIBIT NO. 1 ADMITTED INTO EVIDENCE.)

Q (By Mr. Skelton) Did you then place this defendant under arrest?

A Yes, sir.

MR. SKELTON: Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. DARNELL:

Q At the time you arrested this defendant what was his physical condition?

A I don't know exactly what you are talking about. Was he intoxicated or --

Q Was he sober?

A He had been drinking.

Q Was he bloody, beat up?

A No, sir.

Q Did he have any marks on his body that looked bruised or anything?

A I believe he had a mark on his arm. I believe there was a scratched place on his arm.

Q What about his knee?

A On his knees. What about his face or his teeth?

A No, sir.

Q Did he appear to have any loose

teeth or difficulty in his mouth?

A No, sir.

Q Did he give you any difficulty at the time you [fol.162] arrested him?

A No, sir, he did not.

Q Did he state that he had been in a fight?

A Yes, sir, he had.

Q And this was at the time of his arrest, was about what time, 10:00/ 10:30 at night?

A Approximately 10:00 o'clock.

Q 10:00 p.m. And you took him in and booked him?

A Yes, sir.

Q Did you find any weapon or instrument other than a pocket knife he had in his pocket?

A No, sir.

Q Were there any other persons at this apartment or place other than him?

A We arrested him outside. Now, I don't know whether there was anybody in the apartment or not.

Q He was not in an apartment?

A No, sir. He had just pulled his car into the parking lot.

MR. DARNELL: I have no other questions.

MR. SKELTON: I have no further questions.

THE COURT: Members of the jury, [fol.163] we are going to recess in taking testimony until 10:00 o'clock tomorrow morning. I have another docket that I will have to dispose of and I assume that I can dispose of it before 10:00 o'clock. Will you be back in the jury room at some time before 10:00 o'clock so we can proceed with the taking of testimony. We will stand recessed until 10:00 o'clock tomorrow morning in this case.

[fol.164]

MORNING SESSION
NOVEMBER 10, 1970
10:00 A.M.

THE COURT: Are you ready to proceed?

MR. SKELTON: Yes, Your Honor.

THE COURT: Bring the jury in.

(AT THIS TIME THE JURY IS RETURNED TO THE COURTROOM.)

[fol.165]

TESTIMONY OF JEAN OWENS,

WHEREUPON THE SAID JEAN OWENS WAS CALLED AS A WITNESS BY THE STATE AND, HAVING FIRST BEEN DULY SWORN AND CAUTIONED ON HER OATH, ASSUMED THE WITNESS STAND AND UPON EXAMINATION, TESTIFIED THE FOLLOWING.

DIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q State your name, please ma'am.

A Jean Owens

Q O-w-e-n-s?

A Yes, sir.

Q Are you married or single?

A Married.

Q Where do you work, Mrs. Owens?

A I'm a housewife.

Q Where does your husband work?

A He's a draftsman for Pona Engineers.

Q And where do you live, Mrs. Owens?

A 619 East 7th Street.

[fol.166]

Q What is the name of the apartments located there?

A Studemont.

Q Are those the ones that are owned by Mr. Ray Neatherlin?

A Yes, sir.

Q How long have you lived out there?

A Just about two years.

Q Were you living out there on the 20th day of May, 1970?

A Yes, sir.

Q I'd like to draw your attention to this diagram we have drawn on the board over here. Assuming north is down here toward me and that Oxford is running up this way, these are the apartments, this is the parking area out front, assuming this is Mr. Neatherlin's apartment, Mr. Stacy's apartment here, where would your apartment be?

A It's where the zeroes are drawn.

Q Kind of lopsided zero on the porch. Is that a porch or what?

A It's a porch. I live on the end apartment there.

Q Now, directing your attention to the 20th day of May, 1970, did you have an occasion to see [fol.167] this defendant, Mr. Williams?

A Yes, sir.

Q Is he the gentleman seated over here beside his attorney?

A Yes, sir.

Q What time of the day or night, if you recall, did you first see Mr. Williams?

A It was fifteen until 8:00 or around there.

Q Around a quarter to 8:00. Was it daylight or dark at this time?

A It was still daylight.

Q Where did you first notice Mr.

Williams?

A On that day?

Q Yes, ma'am.

A He drove up in a car and was coming up toward the walk.

Q Toward which way was he coming? Is there a parking area on the south side of the apartments?

A In the back of the apartments.

Q That's toward you on the blackboard?

A Yes, sir.

Q Which way was he walking, between the apartments, between where you live?

A Yes, sir. He was walking up from the parking lot.

Q Had you seen Mr. Williams before? [fol.168]

A Yes, sir.

Q Had he lived in the project?

A Yes, sir.

Q Did you know him by sight and name?

A Yes, sir.

Q You saw him walking up toward whose apartment?

A It was up toward mine and the woman that lived across from me.

Q Who lived across from you?

A Well, Kay Tolley.

Q Is she the lady living where the "X" is, across from your apartment?

A Yes, sir.

Q And where were you when you first noticed him?

A Well, I was sitting outside in a lawn chair, a friend and I.

Q Who was with you?

A Mrs. Williams.

Q Is that the one you commonly call "Gabby"?

A Yes, sir.

Q Does she live out there in the apartment area?

A Yes, sir.

Q After you noticed him what did he do when you first saw him walking up?

A He was going up toward a friend of his, Kay's [fol.169] apartment.

Q Kay Tolley's?

A Yes, sir. And she -- we told him she wasn't there, she was at Mr. Neatherlin's.

Q Have you seen him come to Kay's apartment before? Do you know what their relationship was?

A They were friends, that's all I know.

Q You or Gabby said she was at Mr. Neatherlin's apartment?

A Yes, sir.

Q What did he do after you told him that?

A He sat down with us after and started talking. He said he'd wait until she came back.

Q Where did y'all sit?

A Right in front of my apartment.

Q Isn't there a sidewalk in front of the two buildings?

A Yes, sir. I was on my side.

Q Was he over there with you?

A Yes, sir.

Q How long did he sit over there?

A I'd say around fifteen or twenty minutes.

Q Did you talk or what?

A Just common talk.

Q Did you see Mr. Neatherlin later on?

[fol.170]

A Yes, sir. I guess in about fifteen or twenty minutes Mr. Neatherlin and Kay came around from Mr. Neatherlin's house.

Q Was Kay with Mr. Neatherlin?

A Yes, sir.

Q Was she walking in front or beside him?

A I think it was in front of him.

Q Where did you first notice Mr. Neatherlin?

A I seen him come around the side of the building.

Q Is that where that line is drawn?

A Yes, sir.

Q What did this defendant do when Mr. Neatherlin came around the building.

A He sat there and acted sort of nervous.

Q What did you mean "sort of nervous"?

A Well, just nervous. I noticed he put his right hand in his right pocket.

Q Was this as he saw Mr. Neatherlin?

A After he had seen him.

Q Had Mr. Neatherlin said anything to Mr. Williams when he put his right hand in his pocket?

A No, sir.

Q They were still on your side of the yard?

A Yes, sir.

Q Which hand did he put in his right-hand pocket?

[fol.171]

A He put his right, and the left, he was sort of fooling with his pockets.

Q What did Mr. Williams next do?

A When Mr. Neatherlin got in front of Kay's apartment, Mr. Williams walked towards Mr. Neatherlin.

Q Did he still have his hand in his pocket at this time?

A No, he took it out.

Q How was he holding his hand if you recall?

A Like this.

Q Was it cupped or what?

A It was cupped.

Q He walked toward Mr. Neatherlin. Where did he meet him, on the sidewalk or where?

A It was on the sidewalk, the one that leads up to the apartments on the other side, not my side.

Q But he walked over toward Mr. Neatherlin?

A Yes, sir.

Q What next occurred after he met Mr. Neatherlin by the sidewalk?

A They said hello to each other first.

Q What happened next?

A Mr. Neatherlin said, "What happened about the rent?" And Mr. Williams said, "I don't own you [fol.172] any rent." He said, "Yes, you do." When he said it the second time Mr. Williams got mad and sort of pushed at him.

Q Did you see what area Mr. Williams pushed at Mr. Neatherlin, what portion of the body?

A He pushed with his right hand up toward Mr. Neatherlin's shoulder.

Q Was this the first contact made by these two people?

A Yes, sir.

Q What happened next?

A Then they started fighting.

Q In your opinion who initiated the fight?

A Mr. Williams.

Q And did you ever see a knife in this defendant's hand?

A Well, I didn't see it at first, because it looked like he had it hid with one finger stuck out when they were fighting. When the man came around the building --

Q You said, "the man"?

A Bill Stacy.

Q Did you see Bill Stacy with Mr. Neatherlin when Mr. Neatherlin came around the building?

A No. He didn't come out until the fight was half [fol.173] over.

Q Was then when you first saw the knife?

A Yes, sir.

Q But you did see him put his hand in his pocket prior to going over there to Mr. Neatherlin?

A Yes, sir.

Q And bringing it out?

A Yes, sir.

CROSS EXAMINATION

QUESTIONS BY MR. DARNELL:

Q Mrs. Owens, what kind of clothing did the defendant have on that day?

A Mr. Williams?

Q Yes, ma'am.

A He had a -- I think it was a dress-suit, dress pants and a dress shirt, just dress clothes if I remember.

Q White shirt?

[fol.174]

A I don't really remember, could have

been.

Q What kind of clothing did Mr. Neatherlin have on?

A He just had on a pair of khakis. He didn't even have a shirt on.

Q Khaki pants?

A Yes.

Q What kind of clothing did Mr. Stacy have on?

A Mr. Stacy -- I don't really remember. I think just ordinary clothes. I don't think they were dress clothes, just blue jeans I believe and a shirt.

Q Short-sleeved shirt, long-sleeved shirt?

A Short, I believe, I'm not real positive.

Q Well you seem to be pretty positive that this man put both hands in his pants' pocket, that you observed that?

A Well, he was sitting right next to me.

Q Well, when Mr. Stacy came around and you first observed him, how long had Mr. Neatherlin been there?

A A couple of minutes. They'd been fighting I'd say, well, at least three or four minutes.

Q The defendant, Mr. Williams, and Mr. Neatherlin had been fighting three or four minutes when Mr. Stacy arrived?

[fol.175]

A Yes, sir. He came around the building.

Q You said you observed this defendant push Mr. Neatherlin?

A Yes, sir.

Q What kind of push was it, a hard push?

A No, just a shove. He just shoved him up at his shoulder.

Q Sort of pushing him away from him?

A No. It was really a mean shove. He looked like he was really mad.

Q Did he say anything to indicate he was angry?

A He said he didn't owe anything.

Q He had been accused of owing money, is that correct?

A Yes.

Q What were the words by Mr. Neatherlin at the time of this shove of just immediately prior to the time of the shove in regard to owing him money?

A After he shoved him I believe that's all the words that was said.

Q He told Mr. Williams, this defendant, that he owed him money?

A He said, "I came to see about the rent" and Mr. Williams said he didn't owe any rent.

[fol.176]

Q Did Mr. Neatherlin strike this man and knock him down?

A After they had started fighting. After he had pushed him, well, they both hit each other quite a bit and he knocked Mr. Williams down.

Q Did Mr. Williams get up?

A Yes, sir.

Q Did he stand erect?

A Well, he was sort of slumped. Well, he was standing --

Q Was he on his knee?

A No.

Q He did not raise completely erect?

A Well, he stood up. Well, when he fell down, he got up on his knees and he got back up.

Q Was he being struck all the time?

A No, sir.

Q Was he being struck repeated blows?

A Well, when he knocked him down, he hit him and then when Mr. Williams jumped up, he was hitting Mr. Neatherlin, too, and he always kept doing this.

Q How many times did Mr. Neatherlin strike this defendant? A number of times? Many times?

A Well, at least five or six. I'm not real [fol.177] positive. I didn't count them.

Q As I understand, this fight lasted three or four minutes, and in three/four minutes in a fight there can be lots of activity, just constant shoving, pushing, hitting, of that nature, is that right?

A Yes, sir.

Q So it was a fight that continued?

A It continued until Mr. Stacy hollered.

Q Did you ever see this defendant knock Mr. Neatherlin down?

A No. He didn't knock him down.

Q You stated that this defendant had lived in this apartment project, is that correct?

A Yes, sir.

Q How long did he live there to your best recollection?

A I think it was a couple of months. It might have been two months, I'm not real sure. He didn't live there too long.

Q And you had seen him on numerous occasions?

A Yes, sir.

Q Other than yourself, who were the people that saw this fight?

A My friend Mrs. Williams, we were both sitting out [fol.178] there outside. In fact, there wasn't anybody else out there at the time.

Q It was just you, Mrs. Williams, Mr. Neatherlin and Mr. Williams?

A Yes, sir.

Q And that is the only people that you observed?

A Yes, and Bill.

Q At a later time Mr. Stacy, three or

four minutes after this was going on, he arrived?

A Yes, sir.

Q What did Mr. Stacy say or do when he came up?

A Well, he came around the building and he hollered he said, "Ray, he's got a knife", and he hollered "Drop the knife". He pulled the gun out of the back of his pants. It was in the back of his pants. He just held it and he said, "Drop the knife" and Mr. Williams dropped the knife, and then he picked the stuff up and took off running.

Q Were the police called immediately after that?

A I don't even know who called the police. I know we didn't. My friend and I didn't. I don't know who called them.

Q Did you notice an officer arrive after this had happened?

[fol.179]

A No. Just the ambulance came up and Mr. Neatherlin was already gone to the hospital, a friend had took him. The officer might have went to the manager's apartment. I didn't see him come over to where I lived.

Q How did Mr. Neatherlin leave this scene, did someone assist him?

A Bill helped him. He put his arm around him and sort of helped him walk.

Q Bill Stacy?

A Yes, sir, and they left together.

Q As you were observing this fight, in your opinion who was getting the best of it as far as the pushing and shoving?

A Well, both of them were really.

Q They were fighting?

A Well, they were really fighting, I mean hitting each other at the time. I didn't know he was slicing him until I seen the knife.

Q Did you see any loose teeth around there?

A No, sir.

Q Did you observe this man's mouth being bashed in?

A I seen him hit him on the side one time and right here one time, but I didn't see any teeth.

[fol.180]

MR. DARNELL: I have no more questions.

MR. SKELTON: I have no further questions.

We call Mrs. Williams.

[fol. 181]

TESTIMONY OF GABRIEL JULIA WILLIAMS

WHEREUPON THE SAID GABRIEL JULIA WILLIAMS WAS CALLED AS A WITNESS BY THE STATE AND, HAVING FIRST BEEN DULY SWORN AND CAUTIONED ON HER OATH, ASSUMED THE WITNESS STAND AND UPON EXAMINATION, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q State your name, please ma'am.

A Gabriel Julia Williams.

Q Where do you live?

A 5716 Pear.

Q Who do you live with?

A My husband.

Q How long have you lived over there?

A A month and a half.

Q I believe you were born in Germany?

A Yes.

Q Are you a war bride, or was your husband in the service when you met?

[fol. 182]

A Yes.

Q How long have you been married?

A Two years.

Q And where does your husband work?

A Southwest Dry Wall.

Q Have you ever testified in an American court before?

A No.

Q Directing your attention back to May 20, 1970, where were you and your husband living then?

A 619 East 7th Street, Apartment 8.

Q What is the name of those apartments?

A Studemont Apartments.

Q Do you know this defendant, Mr. Williams, sitting over beside his lawyer?

A Yes.

Q How long have you known him?

A I guess two months. I don't know for sure.

Q Are you talking about prior to May 20th when this fight occurred?

A Yes, sir.

Q How did you happen to know him? Was it because he lived there?

A Yes. He lived next door to me.

Q Where did you live in the apartment complex. There

[fol. 183]

is a drawing over here on the board. Let me show you what all these X's mean. Mr. Neatherlin lived here, Mr. Stacy, Mrs. Tolley. Where did you live here?

A I lived on the other corner.

Q Here?

A Right there.

Q You lived over in this area?

A Yes.

Q And did you have an occasion on the day of the fight on May 20th to see Mr. Williams on that day?

A Yes.

Q Where were you when you first saw the defendant, Mr. Williams?

A I was with Mrs. Owens on her front porch.

Q Would this be over in this area here?

A Yes.

Q Do you recall about what time it was that you first saw Mr. Williams?

A I don't remember. Must have been about 8:00.

Q Around 8:00?

A Yes.

Q And you say you were with Mrs. Owens in her front yard?

[fol. 184]

A Yes.

Q Where did you first notice Mr.

Williams, where was he?

A Well, he came around the building from the car and was going over to that lady's house.

Q You are talking about Mrs. Tolley's?

A Yes, sir.

Q And did he knock on the door, or what did he do?

A No. He was fixing to knock on the door and we told him that she was over at Mr. Neatherlin's office.

Q What happened after you told him that, what next occurred?

A He sat down with us and he talked, you know.

Q And how long did he talk with you before Mr. Neatherlin and Mrs. Tolley came back?

A About ten minutes.

Q Where did you first notice Mr. Neatherlin?

A When he came walking -- he came

(Misnumbered page -- Testimony continues on page 145).

walking around the building there.

Q Is that where that little line is drawn?

A Yes.

Q Now, when Mr. Williams first noticed Mr. Neatherlin, what was the first thing that Mr. Williams did?

[fol. 185]

A Well, he got real nervous and pulled up his britches.

Q Now, prior to that time he had been sitting or what?

A No. He was sitting and he got real nervous when he seen Mr. Neatherlin walking around the corner and he pulled up his britches and reached his hand in his pocket.

Q Do you recall which hand he put in which pocket?

A His right hand.

Q Was this before Mr. Neatherlin ever said anything to him?

A Yes.

Q Was he still standing in Mrs. Owens' front yard when he put his hand in his front pocket?

A Yes.

Q After he put his right hand in his right pants pocket, what did Mr. Williams next do?

A He walked up to Mr. Neatherlin -- he was standing on the corner -- he walked up to him and he said, "Hello" and then Mr. Neatherlin asked him about his rent money he owed him and Mr. Williams said he didn't owe him no rent, then Mr. Neatherlin said, "What about the money you owe me for cleaning up the apartment?"

[fol. 186]

He said he didn't owe him no money and he pushed him on his chest.

Q Who pushed who?

A Mr. Williams pushed Mr. Neatherlin on his chest.

Q Right --

A Right up in here.

Q At this time was Mr. Williams' back to you, or were they facing you or sideways?

A Mr. Williams was facing me and Mr. Neatherlin was in back of me.

Q You saw Williams pushing around the chest?

A Yes.

Q I suppose a fight started after that?

A Yes.

Q When did you first notice the knife in Mr. Williams' hand?

A Well, I didn't notice it at first. I was wondering how come it looked like he was pushing Mr. Neatherlin all the time.

Q Could you see how he was holding

his hand?

A Real funny, somehow like this and it looked like he was pushing him all the time. And then, when all of a sudden Mr. Stacy, he said "He's got a knife" and then I seen it, you know,

[fol. 187]

he dropped it then.

Q Do you recall which hand he had it in?

A In his right hand.

Q Did you see him when he put it in his pocket then?

A Yes.

Q Did you see Mr. Neatherlin after the fight, he was cut?

A Yes. He hold his stomach and he said, "Call an ambulance" and he walked off and blood was all over the place.

MR. SKELTON: I will pass the witness.

[fol. 188]

CROSS EXAMINATION

QUESTIONS BY MR. DARNELL:

Q What clothing did Mr. Williams have on this date?

A What clothing?

Q Yes, ma'am. How was he dressed?

A I remember he had an old hat on -- he's got some old beige hat he always had on -- and a dark suit. I don't recall the color, but I remember it was dark.

Q He had on a suit?

A Yes.

Q Coat and pants?

A Yes.

Q What clothing did Mr. Neatherlin have on on that date?

A All he had on was a pair of slacks.

He didn't have no shirt on.

Q Did you see Mr. Stacy at the time of the fight?

A Yes.

Q What clothing did he have on?

A I don't remember. Oh, yes, he had on some blue

[fol. 189]

jeans. I remember that he had some blue jeans on, but I don't know what shirt.

Q You don't recall what type shirt it was?

A No.

Q You said you saw Mr. Williams push on Mr. Neatherlin?

A Yes.

Q And Mr. Williams was facing in your direction, facing toward you at that time?

A Yes.

Q How far did he push -- how hard did

he push him, real, real hard, just a little bit?

A Well, he pushed him pretty hard, but he didn't fell over.

Q In other words, Mr. Neatherlin just remained erect?

A Yes.

Q What did Mr. Neatherlin do after that?

A I think he hit him on his head or right here, I don't remember.

Q Did Mr. Williams become knocked down?

A No. I don't remember.

Q During this fight or this period of time, how long did this fight last?

A Maybe three minutes, maybe five.

[fol. 190]

Q There was a lot of activity, it lasted some period of time?

A Yes.

Q When Mr. Neatherlin walked up to

where you and Mr. Williams and Mrs. Owens were, who was with Mr. Neatherlin at that time, anyone?

A Well, that lady, I don't know her name, and Bill Stacy, he was with him. He walked behind him.

Q There was a lady?

A Yes.

Q Was she in front, to the side, or where was she in regard to Mr. Neatherlin?

A She was in front of Mr. Neatherlin, you know, more to the side, but she was a little bit before Mr. Neatherlin.

Q She was the first person that appeared?

A Yes, sir.

Q And Mr. Neatherlin right behind with Mr. Stacy?

A Yes.

Q And Mr. Neatherlin had a pair of

khaki pants or some kind of slacks, no shirt?

A No.

Q The first words, his conversation was directed to Mr. Williams in regard to some rent money?

[fol. 191]

A No. Mr. Williams said "Hello" and Mr. Neatherlin said, "Hello", then Mr. Neatherlin asked him about the rent.

Q How long did Mr. Williams live at this complex to the best of your knowledge?

A I don't know, maybe three months.

Q At what point did Mr. Stacy become involved in this fight?

A Well, he -- apparently he seen the knife and he pulled out a gun and he said, "Drop the knife" and that's when, you know, that's when it stopped.

Q That's after this fight had pursued from three to five minutes?

A Yes.

Q But up until that time he did not interfere in any way?

A No.

Q Mr. Neatherlin had his back toward you?

A Yes. He was kind of -- you know, he was just like he was in front of me, like that, that was Mr. Neatherlin.

Q Is it possible he could have kicked this man prior to the time you saw him swing at Mr. Neatherlin?

[fol. 192]

A Pardon me?

Q Is it possible that Mr. Neatherlin could have kicked Mr. Williams with his knee prior to the time that Mr. Williams struck at Mr. Neatherlin that you could not have seen?

A No. I would have seen it.

Q How far were you from Mr. Neatherlin?

A I was right from here to right here. I don't know how many feet it is. I don't know the measurements over here. It was real close.

Q To me?

A No, wasn't that far away.

Q But you saw Mr. Neatherlin make no move?

A No.

Q But he could have done it and you not observed it, it's possible.

A Could be possible, but I would have seen it I'm sure.

Q Did Mr. Williams ever become knocked down? In other words, go down to his knees from a blow in this fight?

A No.

Q He was standing erect at all times?

A Yes.

[fol. 193]

Q For the entire three to five minutes,

whatever?

A Yes.

Q Did anyone try to stop this fight before Mr. Stacy?

A No. Was nobody around except women.

Q How long did you live at these apartments after the fight, before you moved?

A Well, I moved a month and a half ago from there.

Q After this fight was over were a bunch of people talking about it, discussing it?

A Well, I would say so.

Q How many people have you talked to about this fight that you can recall?

A I talked to my husband about it.

Q Is that the only person?

A Well, and then Mrs. Owens, we had talked about it and that's all.

Q You said you saw him reach into his

pocket, his hand in his pocket just before the fight?

A Yes.

Q How many people have you discussed that with prior to today?

A Only with my husband.

Q Have you ever discussed this with Mrs. Owens

[fol. 194]

that you can recall?

A I might have did, I don't know. I don't remember.

Q But this defendant seemed nervous when Mr. Neatherlin arrived?

A Yes.

Q Is Mr. Neatherlin a much larger man than this defendant?

A I think he is.

Q He seemed more robust, physically stronger?

A Yes.

Q But you do not recall that this

man was knocked down at any time in that fight?

A No, I don't remember.

Q You were very close during the entire activity of three to five minutes?

A Yes.

MR. DARNELL: I have no other questions.

MR. SKELTON: I have no further questions.

We will recall Officer Black for a few questions, Your Honor.

[fol. 195]

FURTHER TESTIMONY OF F.G. BLACK (RECALLED),

WHEREUPON THE SAID F. G. BLACK, HAVING PREVIOUSLY BEEN DULY SWORN AND CAUTIONED ON HIS OATH, WAS RECALLED AS A WITNESS AND UPON EXAMINATION, CONTINUED TO TESTIFY AS

FOLLOWS:

DIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q You are the same F. G. Black that's previously testified in this case, are you not?

A Yes, sir.

Q You were the arresting officer, you and your partner, I believe you testified, is that correct?

A Yes, sir, that is correct.

Q Would you describe what Mr. Williams' physical condition was in relation to his face, was he bruised, his lips cut, how did he look?

A Not that I can recall. Like I stated yesterday, I believe he had some scratches on his arm and his knees looked like he had abrasions where he

[fol. 196]

might have fell on the gravel.

Q Did you notice anything about any teeth being missing?

A No, sir.

MR. SKELTON: Could I have this marked?

(STATE'S EXHIBIT NO. 2 MARKED FOR IDENTIFICATION PURPOSES).

Q (By Mr. Skelton) I hand you what we have marked State's Exhibit No. 2 and ask you to look at that, please, sir. Does that truly and accurately depict the way Mr. Williams looked on the night you arrested him?

A Yes, sir, it does.

MR. SKELTON: Your Honor, could we submit this to counsel? We'd

like to offer it into evidence. Any objection?

MR. DARNELL: No.

MR. SKELTON: Your Honor, we submit this to the jury at this time.

THE COURT: It will be received.

[fol. 197]

(STATE'S EXHIBIT NO. 2 IS RECEIVED INTO EVIDENCE.)

MR. SKELTON: Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. DARNELL:

Q Officer Black, about what time did you arrest the defendant?

A It was approximately 10:00 p.m.

Q 10:00 p.m.?

A Yes, sir.

Q And from the information you received this fight had occurred a couple of hours prior to that?

A Yes, it had.

Q You took him immediately to the police station?

A That is correct.

[fol. 198]

A Approximately when was that picture taken?

A I have no idea.

Q It was taken sometime later?

A Yes. After he was booked they run through ID.

Q When was the last time you saw the defendant?

A I'd say approximately 10:45/11:00 p.m.

Q So a picture would have been taken sometime after that?

A Yes, sir.

MR. DARNELL: I have no other questions.

[fol. 199]

REDIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q Officer, you examined State's Exhibit No. 2. Was his mouth the same as it was in State's Exhibit No. 2 when you arrested him?

A Yes, sir.

Q No swelling about his mouth at all?

A No, sir.

MR. SKELTON: I have no further questions.

We recall Mr. Neatherlin for a few questions, Your Honor.

[fol. 200]

FURTHER TESTIMONY OF RAY NEATHERLIN

(RECALLED)

WHEREUPON THE SAID RAY NEATHERLIN, HAVING PREVIOUSLY BEEN DULY SWORN AND CAUTIONED ON HIS OATH, WAS RECALLED AS A WITNESS AND UPON EXAMINATION, CONTINUED TO TESTIFY AS FOLLOWS:

DIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q You are the same Ray Neatherlin that previously testified in this case?

A Yes, sir.

Q I believe you previously testified that Mrs. Tolley was over at your house paying the rent when you and her went over to see what Williams wanted?

A Yes, sir.

Q When you left the house with Mrs. Tolley, what was your purpose for going?

A She made the statement that he just come over to cause trouble and I went over there for that purpose and also the checks.

Q Was it for both reasons?

[fol. 201]

A Yes, sir.

Q Now, when you had the confrontation around the sidewalk before this started, did you ask this defendant to leave your property?

A Yes, sir. I told him I wanted him to get out and never come back.

Q When did you tell him this, before the fight?

A Yes, sir.

Q How much longer after that was it before he struck you in the neck?

A I don't know, just a minute.

Q But you did ask him to leave?

A Yes, sir.

MR. SKELTON: Pass the

witness.

[fol. 202]

CROSS EXAMINATION

QUESTIONS BY MR. DARNELL:

Q What was the first words that you said to this defendant when you arrived to where he was?

A Sir, I don't remember the exact first words.

Q Well, did you say "Hello" or something like that?

A I couldn't tell you.

Q Are you testifying now that the first thing you said was for him to leave?

A No, sir, I'm not saying that that's the first word.

Q Well, I understood from his question, I may be incorrect, but that was the first thing you said.

A Well, it's not the first thing. It

might have been the first thing, I don't remember the exact words that I said. Before the fight started I did ask him to leave.

Q And you also discussed in regards to some checks?

A Yes, sir.

[fol. 203]

Q And he denied that he owed the money on the checks?

A That is correct.

Q When you left your apartment to go to where Mr. Williams and the other people were, Mr. Bill Stacy left and went with you?

A No, sir. I left with Mrs. Tolley.

Q Where did you first see Bill Stacy after you --

A When he hollered at me, told me he had a knife.

Q Well, you walked from your apartment to where Mr. Williams was, the

the only person with you was Mrs. Tolley?

A That is correct.

Q Where was she walking in relation to yourself?

A I believe she was on my right.

Q Walking right close to you?

A Yes, sir.

Q And when you arrived at where Mr. Williams was, it was just you and Mrs. Tolley?

A What do you mean about that now?

Q The people that were there?

A The people that were there -- no, sir, there was Mrs. Williams and Mrs. Owens, and I don't know, there was maybe two or three kids or something around there, I don't remember just how

[fol. 204]

many, wasn't even looking at them.

Q How long did this last from the

time it started until it was over to the best of your recollection?

A Oh, I wouldn't say over two or three minutes probably.

Q But during that time it was a continuous fight?

A Yes, sir, only when I knocked him down --

Q You say you knocked him down?

A Then I stood back and he'd get back up and run at me again.

Q When he was knocked down, what was the defendant's position at that time? Was he on his knees, on the ground or --

A He was just on the ground, that's all I know.

Q He was not standing erect, he was down?

A When I knocked him down, how could he be standing?

Q That's what I'm asking. Do you re-

call how many times he was knocked down, how many times he went down?

A I think about three times probably.

Q Do you recall what clothing the defendant had on at that time?

[fol. 205]

A No, sir. I believe he had on a suit.

Q Pants and coat that match?

A Yes, sir.

Q Was it a light color, medium color, dark color?

A I couldn't say. I don't remember It kind of stands out that it might have been a brown suit. I have seen him with a brown suit. That might have been what he had on. I remember he had on a suit of clothes.

Q Prior to this fight, how long had Mr. Williams been moved from the apartment complex?

A I don't know exactly. I would have

to get my books to see.

Q Well, approximately. A couple of months, three months?

A Something like that I'd say.

Q When you went up to him you wanted to collect the money on those checks?

A That is correct.

Q Had you ever taken any legal action to collect those?

A No, sir.

Q He was not the maker of those checks?

A No, sir.

Q After the fight was over and you left from this

[fol. 206]

scene, how did you leave, by ambulance, automobile or --

A By car.

Q By car?

A One of the tenants there in the apartment project took me to the

hospital.

Q Mr. Stacy took you to the hospital?

A No, sir.

Q Another tenant?

A Another tenant that lived there.

Q Did you see Mr. Stacy point a pistol at this defendant?

A No, sir.

Q And did you see Mr. Stacy with the pistol at any time after?

A I didn't see the pistol. He had a pistol, I didn't see it.

MR. DARNELL: I have no other questions.

[fol. 207]

REDIRECT EXAMINATION

QUESTIONS BY MR. SKELTON:

Q I believe you testified yesterday, did you not, that Mrs. Tolley has since moved from the state and

either resides in Kansas or Illinois, is that correct?

A That is correct.

MR. SKELTON: No further questions.

Your Honor, at this point the State would rest.

MR. DARNELL: Your Honor, the defense will call no witnesses at this time.

THE COURT: The defense rests?

MR. DARNELL: Yes, sir.

THE COURT: Retire the jury, Mr. Defoy.

Will you come to the chambers and we will prepare the charge.

[fol. 234]

CAUSE NO. 151,738

THE STATE OF TEXAS	X	IN THE DISTRICT
	X	COURT OF HARRIS
	X	COUNTY, TEXAS
VS.	X	177TH JUDICIAL
	X	DISTRICT
HARRY LEE WILLIAMS	X	NOVEMBER TERM, A.D.
	X	1970

MOTION FOR A NEW TRIAL

[fols.235-238] * * *

[fol.239]

* * * * *

THE COURT: All of this may or may not be the facts. The jury has resolved the issue against the defendant. The only point that your motion raises that I can see is the possibility that the Court may have been in error in not submitting self-defense of what you now say the defendant is willing to testify to, and I cannot submit the issue or facts to a jury that's already heard the case. There is no action on the part of the prosecution or the Court in preventing the defendant from raising such an issue during the trial, so I [fol.240] think that your motion is without merit, for that reason I'm going to deny the motion. The motion, therefore, is overruled unless you have some other evidence that you wish to offer in connection --

* * * * *

WILLIAMS' EXHIBIT NO. 2

WRITTEN DEPOSITION OF:

MR. CLARENCE KENDALL (taken July 3, 1973)

MR. CLARENCE KENDALL

after having first been duly sworn, in answer to the direct questions propounded to him states as follows:

DIRECT QUESTIONS

1. Were you counsel on November 24, 1970 for Vernon T. Cobb?

A. Yes.

2. On November 24, 1970 did you see Vernon T. Cobb in Judge Love's Court?

A. Yes.

3. Did Vernon T. Cobb have jail clothes (a white garment with "Jail" printed on it) on?

A. Yes. Either that or he had on a white T-shirt and blue jeans along with shower type shoes issued by the jail. I can't remember which.

4. Did Vernon T. Cobb appear before the jury trying his case in said jail clothes?

A. Yes, if there was a jury trial he appeared in his jail clothes.

s/ Clarence Kendall
MR. CLARENCE KENDALL

WILLIAMS' EXHIBIT NO. 3

WRITTEN DEPOSITION OF:

MR. MARION (SANDY) SANFORD
(taken July 3, 1973)

MR. MARION (SANDY) SANFORD

after having first been duly sworn, in answer to the direct questions propounded to him states as follows:

DIRECT QUESTIONS

1. Were you counsel on November 16, 1970 for Forrest Randolph Smith?

A. Yes.

2. On November 16, 1970 did you see Forrest Randolph Smith in Judge Love's Court?

A. Yes.

3. Did Forrest Randolph Smith have jail clothes (a white garment with "Jail" printed on it) on?

A. Yes. He did and also the toe grip bathrobe type slippers.

4. Did Forrect Randolph Smith appear before the jury trying his case in said jail clothes?

A. Yes.

s/ Marion Sanford
MR. MARION (SANDY) SANFORD

WILLIAMS' EXHIBIT NO. 4

WRITTEN DEPOSITION OF:

MR. J. WEIR (taken July 3, 1973)

MR. J. WEIR

after having first been duly sworn, in answer to the direct questions propounded to him states as follows:

DIRECT QUESTIONS

1. Were you counsel on November 23, 1970 for John Clyde Bradley?

A. Yes.

2. On November 23, 1970 did you see John Clyde Bradley in Judge Love's Court?

A. Yes.

3. Did John Clyde Bradley have jail clothes (a white garment with "Jail" printed on it) on?

A. Yes. He did to the best of my recognition.

4. Did John Clyde Bradley appear before the jury trying his case in said jail clothes?

A. Yes. He did to the best of my recognition.

s/ James Weir
MR. J. WEIR

WILLIAMS' EXHIBIT NO. 5

WRITTEN DEPOSITION OF:

MR. E. WAYNE WALKER (taken July 3, 1973)

MR. E. WAYNE WALKER

after having first been duly sworn, in answer to the direct questions propounded to him states as follows:

DIRECT QUESTIONS

1. Were you counsel on October 14, 1970 for Luther Rollins?

A. Yes.

2. On October 14, 1970 did you see Luther Rollins in Judge Love's Court?

A. Yes.

3. Did Luther Rollins have jail clothes (a white garment with "Jail" printed on it) on?

A. Yes.

4. Did Luther Rollins appear before the jury trying his case in said jail clothes?

A. We never tried the case but he was in the jail clothes when the jury was voir dired. The case was dismissed.

s/ E. Wayne Walker
MR. E. WAYNE WALKER

WILLIAMS' EXHIBIT NO. 6

WRITTEN DEPOSITION OF:

MR. C. H. (NEAL) DUVALL
(taken July 3, 1973)

MR. C. H. (NEAL) DUVALL

after having first been duly sworn, in answer to the direct questions propounded to him states as follows:

DIRECT QUESTIONS

1. Were you counsel on October 30, 1970 for Eugene Joe Hill?

A. Yes.

2. On October 30, 1970 did you see Eugene Joe Hill in Judge Love's Court?

A. Yes.

3. Did Eugene Joe Hill have on jail clothes (A white garment with "Jail" printed on it) on?

A. He probably was; he was a "jail case", but it has been so long. I don't remember exactly.

4. Did Eugene Joe Hill appear before the jury trying his case in said jail clothes?

A. He probably did; he was a jail case.

s/ C. H. (Neal) Duvall
MR. C.H. (NEAL) DUVALL

ESTELLE'S EXHIBIT NO. 1

(Certificate of State Court Trial Judge)

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

I, Miron A. Love, Judge of the 177th Judicial District Court of Harris County, Texas, hereby certify that I was presiding judge in Cause No. 151738, entitled The State of Texas v. Harry Lee Williams, which trial commenced on November 9, 1970, and at which the defendant was tried and convicted for the offense of assault with intent to murder with malice aforethought. The defendant was found guilty by the jury and was assessed by the court as punishment confinement in the state penitentiary for ten years.

I certify that as District Judge presiding at the trial of said above mentioned cause in the 177th Judicial District Court of Harris County, Texas, I have reviewed the record in this cause, and I have in-

dependent recollection of the events and evidence, and of the issues raised in this trial. I have been asked about my policy in regard to defendants who were tried in jail clothing. I can state unequivocably that if at any time a defendant or his attorney made known to me either before or during the trial that he did not wish to be tried in jail clothing, I would have granted his request, and permitted him time to obtain civilian clothing to wear at his trial.

I have been Judge of the 177th District Court of Harris County, Texas, since December 1, 1958, and on numerous occasions during that period of time I have granted requests by defendants or their attorneys for them to be allowed to obtain civilian clothes to wear at their trials. I have never compelled a defendant to go to trial in jail clothes, and on every occasion when a defendant or his attorney re-

quested that he be allowed to wear civilian clothes at his trial I have granted the request.

In the above trial of defendant Williams in Cause No. 128047, no objection was ever raised by defendant or his attorney regarding the fact that the defendant was being tried in jail clothing. At no time before or during said trial did either the defendant or his attorney of record request or make known to me that either of them wished that defendant be tried in civilian clothing. Had such request been made by either defendant or his attorney, I would have granted such request and permitted the defendant to be tried in civilian clothing at his trial.

s/ Miron A. Love
MIRON A. LOVE, JUDGE
177th Judicial District
Court, Harris county,
Texas

STATE OF TEXAS, COUNTY OF HARRIS

Before me, the undersigned authority, on this day personally appeared Miron A. Love, Judge of the 177th Judicial District Court of Harris County, Texas, known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me acknowledges that the statements contained in the foregoing instrument are true and correct.

Given under my hand and seal of office this 6th day of March, 1973.

s/ Georgia Sue Massengale
Notary Public in and for
Harris County, Texas

ESTELLE'S EXHIBIT NO. 2

STATE OF TEXAS X
X
COUNTY OF HARRIS X

AFFIDAVIT

BEFORE ME, the undersigned, a Notary Public in and for said county and state, on this day personally appeared Marion Sanford, known to be a competent and credible person and over the age of twenty-one (21) years, and who, after being duly sworn did depose and say as follows:

My name is Marion Sanford, Jr., I am a practicing attorney licensed to practice law in the State of Texas. I served as court appointed counsel for one Forrest Randolph Smith, who was the defendant in a criminal case tried in Harris County District Court before Judge Myron A. Love on November 16, 1970. My recollection is that Mr. Smith was tried while wearing jail clothing. Although I am not positively certain about the matter, I believe

that I briefly discussed the fact that the defendant was being tried in jail clothing with Mr. Michael Ramsey, who was serving as co-counsel with me on the case. I do not distinctly recall our reasoning on this matter, however, we did not raise an objection nor make a request that the defendant be tried in civilian clothing in that case. However, I will state that in the few criminal cases which I have participated in, it is my opinion that the wearing of jail clothing by the defendant does not make a significant difference before the jury.

s/ Marion Sanford, Jr.
Marion Sanford, Jr.

The above and foregoing Affidavit was sworn to and subscribed before me by Marion Sanford, Jr. on the 3 day of July, 1973, to certify which, witness my hand and seal of office.

s/ Barbara Stephenson
Notary Public, Harris
County, Texas

ESTELLE'S EXHIBIT NO. 3

STATE OF TEXAS X
X
COUNTY OF HARRIS X

AFFIDAVIT

BEFORE ME, the undersigned, a Notary Public in and for said county and state, on this day personally appeared Clarence Kendall, known to be a competent and credible person and over the age of twenty-one (21) years, and who, after being duly sworn did depose and say as follows:

My name is Clarence Kendall. I am over 21 years of age and licensed to practice law in the State of Texas. My records indicate that I was court appointed counsel for one Vernon T. Cobb who was the defendant in a criminal case tried in Harris County District Court before Judge Myron A. Love on November 24, 1970. My recollection is that Mr. Cobb was tried while wearing some sort of jail clothing.

However, I have no other independent recollection about this trial. I do not remember at this time the reason why I did not object to the wearing of jail clothes by Mr. Cobb nor why I did not request that Mr. Cobb be allowed to wear civilian clothes at such trial. Further, I would state that from my past associations and dealings with Judge Love, it is my opinion that he would have sustained any objection to a defendant's wearing jail clothes and would have made every reasonable attempt to see that the defendant was supplied with civilian clothing to wear at a trial.

s/ Clarence Kendall
CLARENCE KENDALL

The above and foregoing Affidavit was sworn to and subscribed before me by Clarence Kendall on the 28th day of June,

1973, to certify which, witness my hand and seal of office.

s/ Allene Hopkins
Notary Public, Harris
County, Texas

ESTELLE'S EXHIBIT NO. 4

STATE OF TEXAS §
§
COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned, a Notary Public in and for said county and state, on this day personally appeared J. Weir, known to be a competent and credible person and over the age of twenty one (21) years, and who, after being duly sworn did depose and say as follows:

My name is J. Weir. I am a practicing attorney licensed to practice law in the State of Texas. I served as court appointed counsel for John Clyde Bradley, who was the defendant in a criminal case tried in Harris County District Court before Judge Myron A. Love on November 23, 1970. My best recollection is that Mr. Bardley was tried before a jury in jail clothes. To my recollection neither

I nor my co-counsel, Mr. Maurice Westerfield, objected or made a request that the defendant be tried in civilian clothing.

s/ James L. Weir
J. Weir

The above and foregoing Affidavit was sworn to and subscribed before me by J. Weir on the 5 day of July, 1973, to certify which, witness my hand and seal of office.

s/ Carol A. Goedeke
Notary Public, Harris County, Texas

RECEIVED
DEC 30 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 74-676

* * *

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

* * *

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

BEN L. ADERHOLT
Attorney for Respondent
1100 Houston First Savings Building
711 Fannin Street
Houston, Texas 77002

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-676

October Term, 1974

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Respondent, Harry Lee Williams, respectfully prays that the Petition for a Writ of Certiorari as prayed for by the Petitioner, W. J. Estelle, Jr. be denied.

OPINION BELOW

The opinion delivered in the court below which reversed Respondent's conviction is reported at 500 F.2d 206 (1974) and is appended to the Petition as Appendix "A". The opinion of the United States District Court for the Southern District of Texas, which, denied Respondent's application for a writ of habeas corpus, is reported at 364 F.Supp. 335 (1973), a copy of which is appended to the Petition as Appendix "B". A copy of the opinion of the Court of Criminal Appeals of Texas which affirmed the Respondent's conviction is appended to the Petition as Appendix "C".

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case as found in its Petition. Respondent does not accept

ESTELLE'S EXHIBIT NO. 2

STATE OF TEXAS X
X
COUNTY OF HARRIS X

AFFIDAVIT

BEFORE ME, the undersigned, a Notary Public in and for said county and state, on this day personally appeared Marion Sanford, known to be a competent and credible person and over the age of twenty-one (21) years, and who, after being duly sworn did depose and say as follows:

My name is Marion Sanford, Jr., I am a practicing attorney licensed to practice law in the State of Texas. I served as court appointed counsel for one Forrest Randolph Smith, who was the defendant in a criminal case tried in Harris County District Court before Judge Myron A. Love on November 16, 1970. My recollection is that Mr. Smith was tried while wearing jail clothing. Although I am not positively certain about the matter, I believe

that I briefly discussed the fact that the defendant was being tried in jail clothing with Mr. Michael Ramsey, who was serving as co-counsel with me on the case. I do not distinctly recall our reasoning on this matter, however, we did not raise an objection nor make a request that the defendant be tried in civilian clothing in that case. However, I will state that in the few criminal cases which I have participated in, it is my opinion that the wearing of jail clothing by the defendant does not make a significant difference before the jury.

s/ Marion Sanford, Jr.
Marion Sanford, Jr.

The above and foregoing Affidavit was sworn to and subscribed before me by Marion Sanford, Jr. on the 3 day of July, 1973, to certify which, witness my hand and seal of office.

s/ Barbara Stephenson
Notary Public, Harris
County, Texas

ESTELLE'S EXHIBIT NO. 3

STATE OF TEXAS X
X
COUNTY OF HARRIS X

AFFIDAVIT

BEFORE ME, the undersigned, a Notary Public in and for said county and state, on this day personally appeared Clarence Kendall, known to be a competent and credible person and over the age of twenty-one (21) years, and who, after being duly sworn did depose and say as follows:

My name is Clarence Kendall. I am over 21 years of age and licensed to practice law in the State of Texas. My records indicate that I was court appointed counsel for one Vernon T. Cobb who was the defendant in a criminal case tried in Harris County District Court before Judge Myron A. Love on November 24, 1970. My recollection is that Mr. Cobb was tried while wearing some sort of jail clothing.

However, I have no other independent recollection about this trial. I do not remember at this time the reason why I did not object to the wearing of jail clothes by Mr. Cobb nor why I did not request that Mr. Cobb be allowed to wear civilian clothes at such trial. Further, I would state that from my past associations and dealings with Judge Love, it is my opinion that he would have sustained any objection to a defendant's wearing jail clothes and would have made every reasonable attempt to see that the defendant was supplied with civilian clothing to wear at a trial.

s/ Clarence Kendall
CLARENCE KENDALL

The above and foregoing Affidavit was sworn to and subscribed before me by Clarence Kendall on the 28th day of June,

1973, to certify which, witness my hand and seal of office.

s/ Allene Hopkins
Notary Public, Harris
County, Texas

ESTELLE'S EXHIBIT NO. 4

STATE OF TEXAS X
X
COUNTY OF HARRIS X

AFFIDAVIT

BEFORE ME, the undersigned, a Notary Public in and for said county and state, on this day personally appeared J. Weir, known to be a competent and credible person and over the age of twenty one (21) years, and who, after being duly sworn did depose and say as follows:

My name is J. Weir. I am a practicing attorney licensed to practice law in the State of Texas. I served as court appointed counsel for John Clyde Bradley, who was the defendant in a criminal case tried in Harris County District Court before Judge Myron A. Love on November 23, 1970. My best recollection is that Mr. Bardley was tried before a jury in jail clothes. To my recollection neither

I nor my co-counsel, Mr. Maurice Westerfield, objected or made a request that the defendant be tried in civilian clothing.

s/ James L. Weir
J. Weir

The above and foregoing Affidavit was sworn to and subscribed before me by J. Weir on the 5 day of July, 1973, to certify which, witness my hand and seal of office.

s/ Carol A. Goedeke
Notary Public, Harris County, Texas

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OCTOBER TERM, 1974

* * *

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W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

* * *

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

BEN L. ADERHOLT
Attorney for Respondent
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711 Fannin Street
Houston, Texas 77002

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-676

October Term, 1974

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

REPLY TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

The Respondent, Harry Lee Williams, respectfully prays that the Petition for a Writ of Certiorari as prayed for by the Petitioner, W. J. Estelle, Jr. be denied.

OPINION BELOW

The opinion delivered in the court below which reversed Respondent's conviction is reported at 500 F.2d 206 (1974) and is appended to the Petition as Appendix "A". The opinion of the United States District Court for the Southern District of Texas, which, denied Respondent's application for a writ of habeas corpus, is reported at 364 F.Supp. 335 (1973), a copy of which is appended to the Petition as Appendix "B". A copy of the opinion of the Court of Criminal Appeals of Texas which affirmed the Respondent's conviction is appended to the Petition as Appendix "C".

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case as found in its Petition. Respondent does not accept

Petitioner's statement of the Rule in the Fifth Circuit nor his statement of the law in these United States.

The established Rule in the Fifth Circuit holds that the trial of an accused dressed in prison clothes infringes upon the fundamental right to the presumption of innocence. This line of authority is found in nine cases beginning with Brooks v. Texas, 381 F.2d 619 (1967); Hernandez v. Beto, 443 F.2d 634 (1971); Garcia v. Beto, 452 F.2d 655 (1971); U.S. v. Fideler, 457 F.2d 921 (1972); Goodspeed v. Beto, 460 F.2d 398 (1972); Hollins v. Beto, 467 F.2d 951 (1972); U.S. ex rel Stahl v. Henderson, 472 F.2d 556 (1973); and ending with the decision in Thomas v. Beto, 474 F.2d 981 (1973), rendered the year before the decision in the case upon appeal. A reading of these cases makes it apparent that the test in the Fifth Circuit is whether the Petitioner (1) willingly, intelligently, and knowingly waived his right to not be tried in prison garb and, if not, was the probable impact upon the jury by trying him in prison garb harmless beyond a reasonable doubt, (2) taking into consideration whether all material facts lead unerringly to Defendant's guilt.

REPLY TO PETITIONER'S REASONS FOR GRANTING THE WRIT

1. Reply to Point One: The holding of the United States Court of Appeals for the Fifth Circuit concerning trial of a Defendant in jail clothes is sound.

Petitioner predicates his argument upon the statement "the fact that a Defendant wore jail clothes during a jury trial does not create a negative inference". Respondent strongly disagrees. A man accused of crime is entitled to the appearance, dignity, and self-respect of a free and innocent man. For the Defendant to stand a trial in prison clothes suggests all kinds of things: poverty, dangerous character, that Defendant is worthless, guilty, or has been re-arrested, and a host of other negative inferences.

In the trial of this case in the United States District Court, Respondent's Exhibit No. 7 showed that every Defendant (during a stated term of court) not released on bond was tried before a jury in prison garb. The United States District Court found that the records clearly showed that there existed a practice to try incarcerated defendants ("all non-bailed defendants") in prison garb. Williams v. Beto, 364 F.Supp. 335, 343 (SD Tex. 1973).

Further, the Petitioner requests this Court to assume that a Defendant's appearance in jail garb always renders a jury sympathetic to the Defendant. Such an assertion does not square with court-room experience, for what will affect one juror one way may very well affect his companion juror in quite the other.

2. Reply to Point Two: The Fifth Circuit's holding will not have a catastrophic impact upon the administration of justice.

Anytime a novel point of law is resurrected, inmates are going to file applications for relief based upon the particular point. However, the percentage of inmates to which the "Hernandez" doctrine could apply, is extremely small. The Hernandez Rule can only apply to those cases tried before a jury, on a plea of not guilty, with a record complete enough to prove that the Defendant was tried unwillingly in jail clothes, and which trial resulted in a guilty verdict. It is apparent, therefore, that this particular rule is one of very narrow application.

3. Reply to Point Three: This court should not grant Certiorari because there is no conflict between the Circuit Courts.

Petitioner asserts that the Tenth and Fourth Circuits have reached decisions on the jail clothes issue which conflict with the holdings in the Fifth Circuit.

Respondent has located three Tenth Circuit cases on the issue at bar. In Watt v. Page, 452 F.2d 1174 (Tenth Circuit, 1972), 405 US 1070, 31 LEd 2d 803, cert. den., the court stated that it did not agree with the Fifth Circuit holding in Hernandez to the extent that it appeared to require an automatic reversal if a Defendant proved he was tried in jail clothing. (At page 1175.) The case was returned to the U.S. District Court for an evidenciary hearing, at which the District Court found the Defendant to be prejudiced because he was tried in jail clothes. The Tenth Circuit then affirmed the lower court's finding of prejudice. Anderson v. Wyatt, 475 F.2d 881 (Tenth Circuit, 1973). The same rule was applied the next year in U.S. v. Williams, 498 F.2d 547 (Tenth Circuit, 1974). This case and Garcia v. Beto, 452 F.2d 655 (Fifth Circuit, 1971) reach precisely the same result. That there is no real conflict between the Tenth and the Fifth Circuits is seen by a careful reading of the explanatory language by the Fifth Circuit when it stated, upon re-hearing, that "a Defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error". Hernandez v. Beto, 443 F.2d 634, 637.

Petitioner has not complied with Rule 19 (1) (b) by his failure to show a conflict between the Fourth and Fifth Circuits. Those cases upon which the Petitioner relies to support a conflict between those two circuits are McFall's v. Peyton, 270 F.Supp. 577 (W.D.Va. 1967) and Hall v. Cox, 344 F.Supp. 786 (W.D.Va. 1971). Not only are both of those cases District Court decisions, but they are pre-Hernandez cases. They are predicated on cases which Hernandez specifically disapproved. McFall's v. Peyton was affirmed, but on other grounds, at 401 F.2d 890 (Fourth Circuit, 1968) cert. den. 394 US 951 (1969).

Therefore, not only is there no Fourth Circuit cases on the issue to conflict with the Fifth Circuit Rule, but the Tenth Circuit decisions quite clearly square with the holdings in the Fifth Circuit. Besides that, the Third and Ninth Circuits agree with the Fifth Circuit.

The Third Circuit accepted the majority view in Gaito v. Brierly, 485 F.2d 86 (Third Circuit, 1973), that compelling a Defendant to appear before a jury in his prison clothes unconstitutionally infringes his due process right to be presumed innocent until proven guilty. (At page 88.) This holding is reaffirmed in Lemons v. U.S., 489 F.2d 344 (Third Circuit, 1974).

The Ninth Circuit has denounced the practice of trying a prisoner in jail clothes in stronger terms. In Bentley v. Crist, 469 F.2d 854 (Ninth Circuit, 1973), the court critized the trial Judge's finding that trying the accused in jail garb did not amount to a denial of the Constitutional right to presumption of innocence. The Ninth Circuit stated, "This is contrary to the weight of authority in State and Federal Courts". Further, the court rejected the State of Montana's argument that the presumption of innocence is impermissibly impaired only when the accused is denied access to readily available civilian clothing. (At page 856.)

In conclusion, the lower court's decision was correct and did justice. Its holding will further prevent the continued abuse, or worse, the reinstitution of trials of indigence in prison clothes. It would, therefore, serve justice and further help guarantee the purity of trial by jury for this court to deny Petitioner's application for a Writ of Certiorari.

Respectfully submitted,

Ben L. Aderholt

Ben L. Aderholt,
Attorney for Respondent
1100 Houston First Savings Building
711 Fannin Street
Houston, Texas 77002
(713) 222-0351

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-676

W. J. ESTELLE, JR., DIRECTOR

TEXAS DEPARTMENT OF CORRECTIONS,

PETITIONER,

V.

HARRY LEE WILLIAMS,

RESPONDENT

A F F I D A V I T

STATE OF TEXAS, COUNTY OF Walker.

I, HARRY LEE WILLIAMS, Petitioner in the foregoing cause, do hereby state on Oath that I am unable to pay the costs incident to this proceeding or any other proceedings in relation to this cause, or to give security therefor.

Harry Lee Williams

HARRY LEE WILLIAMS

BEFORE ME, the undersigned authority, on this day personally appeared HARRY LEE WILLIAMS who stated on Oath that the foregoing is true and correct to witness which my hand and seal of office on this the 11 day of December, 1974.

Wilfred J. Burkeen

NOTARY PUBLIC in and for the County of WALKER, State of Texas.

Supreme Court, U. S.
FILED
MAR 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 74-676

* * *

W. J. ESTELLE, JR.,

Petitioner

V.

HARRY LEE WILLIAMS

Respondent

* * *

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

* * *

BRIEF FOR THE PETITIONER

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

DUNKLIN SULLIVAN
Assistant Attorney General

Attorneys for Petitioner

P. O. Box 12548
Capitol Station
Austin, Texas 78711

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IN THE

SUPREME COURT OF THE UNITED STATES
TERM, 1974

* * *

NO. 74-676

* * *

W. J. ESTELLE, JR.
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

* * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

BRIEF FOR THE PETITIONER

* * *

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 500 F.2d 206.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on September 6, 1974, and the Petition for Certiorari was filed in this Court on November 29, 1974. Certiorari was granted on January 27, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), and Section 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ."

The Fourteenth Amendment provides:

> ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

QUESTIONS PRESENTED

1. WHETHER A DEFENDANT'S TRIAL IN JAIL CLOTHING DESTROYS THE "PRESUMPTION OF INNOCENCE" SO AS TO DENY HIM A FAIR TRIAL?

2. SINCE THERE MAY BE A POSSIBIL-

ITY OF SOME UNFAIRNESS TO A DEFENDANT WHO IS TRIED IN JAIL CLOTHES, SHOULD A RULE PROSCRIBING THE TRIAL OF A DEFENDANT IN JAIL CLOTHES BE ACCORDED ONLY PROSPECTIVE APPLICATION?

STATEMENT OF THE CASE

Williams was convicted in the 177th Judicial District Court of Harris County, Texas, for the offense of assault with intent to murder with malice. Williams plead not guilty, was found to be guilty by the jury, and was assessed by the court as punishment confinement for ten years in the state penitentiary. The said judgment and sentence was appealed to the Court of Criminal Appeals of Texas, and said judgment of conviction was affirmed in an opinion delivered February 9, 1972, styled Williams v. State, 477 S.W.2d 24 (Tex.Crim. 1972). Williams in his state court appeal, raised substantially the same issue that was raised in his application for writ of habeas corpus in the United States District Court below, and in the United States Court of Appeals for the Fifth Circuit.

Respondent filed his application for writ of habeas corpus in the United States District Court for the Southern District of Texas, and on October 2, 1973, the District Court denied relief holding that Williams' trial in jail clothing, while inherently prejudicial, was under the facts presented, harmless error. Williams appealed this decision to the United States Court of Appeals, and on September 6, 1974, the Fifth Circuit reversed the holding of the United States District Court ruling that Williams'

trial in jail clothing was inherently prejudicial and was not harmless error.

It is now the established rule in the Fifth Circuit that the trial of a criminally accused attired in prison clothing infringes the fundamental right to the presumption of innocence. See Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971), cert. denied 404 U.S. 897 (1971), and Brooks v. State of Texas, 381 F.2d 619 (5th Cir. 1967). This per se rule adopted by the Fifth Circuit automatically upends the conviction of all defendants tried in jail clothing with the exception of the following modifications:

(a) When a defendant is on trial for a prison offense against a fellow inmate in an environment where such clothing is the normal attire, there is no prejudice for the jury to see that which is already known. United States ex rel Stahl v. Henderson, 472 F.2d 556 (5th Cir. 1973).

(b) If trial counsel intended to use jail clothing as a tactic to gain sympathy with the jury, no reversal is warranted. Garcia v. Beto, 452 F.2d 655 (5th Cir. 1972).

(c) If all of the facts lead unerringly to guilt, and no possible inference clouds or conflicts any essential or material fact, then the trial of a defendant in jail clothes may be harmless beyond a reasonable doubt. Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973).

SUMMARY OF ARGUMENT

1. The Constitution of the United States

guarantees to a defendant a fair trial, not a perfect trial. Petitioner therefore states that the trial of a defendant in jail clothing does not destroy his right to a fair trial by creating in the minds of the jury an inference of guilt. Since jurors are aware that defendants are arrested and kept in jail prior to the time they are brought to court for trial, they would also expect a defendant to appear in the courtroom in jail uniform. Certainly, being tried in jail clothes is no more prejudicial than the reading to the jury of the indictment which charges the defendant with a crime, the reading to the jury of prior convictions in the indictment for purposes of enhancement under recidivist statutes, or the reading to the jury of multi-count indictments and the use of multi-defendant trials as authorized by Rules 8 and 13 of the Federal Rules of Criminal Procedure.

2. While a ruling by this Court proscribing the trial of a defendant in jail clothes might avoid some unfairness at trial by enhancing the reliability of the fact-finding process, the rule should not be applied retroactively since trial in jail clothing is not so fundamentally unfair that it infects a criminal proceeding with a clear danger of convicting the innocent. The Fifth Circuit's holding that trial in jail clothes destroys the fairness of a defendant's trial has caused a flood of writs to be filed by prisoners tried or contending they were tried in their prison clothes. Prior to the Fifth Circuit's decision in Hernandez, supra, no federal court had set aside a state conviction solely because a defendant was tried in jail clothes. Trial in jail clothing was said to be "inherently unfair" in Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967), but

the decision granting relief was based on the ineffective assistance of counsel. Petitioner's stance on this position is supported by the holding in Xanthull v. Beto, 307 F. Supp. 903 (S.D. Tex. 1970), decided three years after the decision in Brooks, and in which a federal district judge in Houston, Texas, ruled that trial in jail clothes was not inherently prejudicial.

ARGUMENT

1. A DEFENDANT'S TRIAL IN JAIL CLOTHING DOES NOT DESTROY THE "PRESUMPTION OF INNOCENCE" SO AS TO DENY HIM A FAIR TRIAL.

Petitioner respectfully submits that the trial of a defendant in jail clothing does not suggest or indicate to the jury that the defendant is guilty. The fact that a defendant wore jail clothes during a jury trial does not create a negative inference. A juror could certainly be expected to know that many defendants who are arrested are kept in jail prior to the time they are brought to court for trial. This fact does not destroy the presumption of innocence and neither should the presumption of innocence be destroyed by their being seen in the courtroom in jail attire. A defendant's presence before the jury in jail clothing only confirms that he has been held in jail prior to the time of the trial, and Petitioner strongly maintains that this does not influence the jury to find the defendant guilty.

Petitioner states that the nature of clothing worn by a defendant is not so inherently prejudicial as to deny him his right to a fair and impartial

trial, and that the testimony given in a representative case presently pending in the Fifth Circuit, Scruggs v. Estelle, No. 74-3180, supports this position. In Scruggs the following testimony developed at a state habeas hearing reflects the following by three jurors who testified at the state habeas hearing concerning the defendant's trial in jail clothes.

Juror Clemons:

> "Q. Mrs. Clemons, do you recall how the Petitioner was dressed on the occasion of that trial?
>
> A. No, I have a vague recollection of a gray or blue and white but I couldn't describe what he was wearing at all.
>
> Q. Do you recall whether or not the way that he was dressed in any way affected your verdict?
>
> A. No, it didn't affect me.
>
> Q. I will ask you whether or not you were satisfied in your own mind based purely on the evidence that you heard from the witness stand that he was guilty?
>
> A. Yes.

Q. And, in the occasion of fixing his punishment, did the manner in which he was dressed in any way affect the punishment that you gave him?

A. No." (S/F 5).

Juror Austin:

"Mr. Austin, do you now recall how Mr. Scruggs was dressed at that trial?

A. Yes, sir, I do. He was dressed just as he is right now sir.

Q. The same type of blue coveralls that he's wearing now?

A. Yes, sir.

Q. Do you recognize that as being any particular type of attire?

A. Not necessarily so. It's a uniform-type coverall which is about all I can say about it.

Q. Do you recall any identifying marks that he had on his clothing at that time?

A. No, sir, I sure don't.

Q. In the course of your deliberations as a juror, I will ask you whether or not the manner in which he was dressed influenced your verdict?

A. No, sir. I can say definitely not because I was more or less interested in the facts rather than on the appearance of him.

Q. All right, sir, and I will ask you whether or not that in any way influenced the amount of punishment that you gave him?

A. No, sir, it did not." (S/F 7, 8).

Juror Fenton:

"Q. Do you recall whether or not the manner in which he was dressed in any way affected your verdict?

A. I don't think the manner in which he was dressed would have influenced it very much. If it had of, it probably would have been in sympathy with the defendant." (S/F 11).

Williams was represented by retained counsel at trial (A. 51), who made no objection to his being tried in jail clothes as he felt such an objection would be futile. (A. 57-59). At the voir dire examination of the jury panel in Williams' state court trial, the prosecuting attorney asked this question of the prospective jurors,

> "This defendant is sitting in jail clothes. I am assuming he's been in jail to the time of this trial. You are not to take this into consideration. The fact a man is in jail clothes shouldn't make you feel he is guilty any more than if he were in street clothes.
>
> "The second thing, often times evidence will come out that a person has been in jail for seven months or eight months awaiting trial. By the same token, this should not be taken into consideration on your verdict, because you are supposed to go straight down the line, guilty or not guilty, and not let how a person is dressed influence your decision. Could you do that in this case?" (Ex. 30, 31).

The prosecutor also asked the jurors

> "I have gone over reasonable doubt, gone over the business of how the defendant was dressed, the fact he

> may or may not have been in the jail all this time. Would your answers be any different than the other jurors? Would you give us a fair trial as well as this defendant?" (Ex. 33).

Also during the voir dire of the jury, the defense attorney asked the prospective jurors

> "As you heard, he is in jail clothes. Would that effect anyone's opinion of him?" (Ex. 35).

No juror indicated that he would be prejudiced because Williams had on jail attire.

The only references made to Williams being in jail clothes at trial was when the complaining witness identified him as

> "He's the fellow with the white uniform on." (Ex. 42);

and when another witness testified,

> "Well, he approached the gentleman sitting over there in the uniform." (Ex. 87).

Marion Sanford, Jr., an attorney who practiced in Harris County, Texas, at the time Williams was tried, stated in an affidavit

> "I will state that in the few criminal

> cases which I have participated in, it is my opinion that the wearing of jail clothing by the defendant does not make a significant difference before the jury." (Ex. 190, 191).

Petitioner's position is supported by the United States District Court for the Southern District of Texas which, (before the Fifth Circuit's decision in Hernandez v. Beto), held in Xanthull v. Beto, 307 F.Supp. 903 (S.D. Tex. 1970), that

> "The tenuous possibility that the jury might have been influenced for or against defendant's guilt in this case by his jail clothing is too frail a reed to rely upon as a predicate for setting aside the state court conviction."

The court also held that a defendant's attire in jail clothing could have aroused the sympathy of the jury and thereby mitigated other overwhelming direct evidence of his guilt.

In Hall v. Cox, 324 F.Supp. 786 (W.D. Va. 1971), the court held that the fact that a defendant was tried in prison uniform was not so prejudicial as to deprive him of due process of law, and the Tenth Circuit has held that the nature of clothing worn by a defendant is not inherently prejudicial to his right to a fair and impartial trial.

In United States v. Williams, 498 F.2d 547 (10th Cir. 1974), a federal prisoner was displayed before the jury while wearing soiled jail clothing. Although the defendant declined an offer by the Deputy Marshal to change to his street clothes the United States District Judge held:

> "It's the Court's judgment, however, that there has not been any substantial prejudice by reason of appearance for this much of the trial in the T-shirt and levi's."

The Tenth Circuit in Watt v. Page, 452 F.2d 1174 (1972), cert. den. 405 U.S. 1070 (1972), expressly rejected the Fifth Circuit's holding in Hernandez v. Beto, and said at page 1176,

> "We do not hold that the nature of the clothing worn by the petitioner at his trial was inherently prejudicial of his right to a fair and impartial trial."

This case was sent back for further development of the facts, and on the second appeal the Tenth Circuit again reaffirmed their view that the clothing worn by a defendant at his trial is not inherently prejudicial to his right to a fair and impartial trial. See Anderson v. Watt, 475 F.2d 881 (10th Cir. 1973). The last writing to Petitioner's knowledge on this issue by the Tenth Circuit is found in United States v. Williams, supra. In that case the Tenth Circuit again said they expressly rejected the per se rule of the Fifth Circuit as set out in Hernandez v. Beto.

The Fourth Circuit is in accord with the Tenth Circuit and has stated that in the absence of a showing of prejudice, a defendant is not denied a fair trial because he appeared before the jury in his prison uniform. See McFalls v. Peyton, 270 F.Supp. 577 (W.D. Va. 1967), aff'd 401 F.2d 890 (4th Cir. 1968), cert.den. 394 U.S. 951 (1969). To the same effect is Hall v. Cox, supra, where the court stated that the fact that a defendant was tried in prison uniform was not so prejudicial as to deprive him of due process of law. See also May v. Peyton, 268 F.Supp. 928 (W.D. Va. 1967), rev'd on other grounds, 398 F.2d 476 (4th Cir. 1968).

The position of the Ninth Circuit on this question is not clear as the court held in Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972), that compelling the accused to wear prison clothing may deny to him the presumption of innocence.

Although the Third Circuit appears to be in accord with the proposition that the appearance of a defendant before a jury in prison clothing unconstitutionally infringes his due process right to be presumed innocent until proven guilty, Gaito v. Brierley, 485 F.2d 86 (3rd Cir. 1973), at least one of the judges of that Circuit disagrees with the holding. See Lemons v. United States, 489 F.2d 344, 347 (3rd Cir. 1974).

Certainly being tried in jail clothes no more destroys the presumption of innocence than does the reading to the jury of the indictment which states that the grand jurors, good and lawful men, upon their oath do swear that a defendant has committed some act that is against the peace and dignity of the State.

The appearance of a defendant in jail clothing also would not be any more prejudicial to a defendant than the alleging and reading to the jury that is to decide a defendant's guilt or innocence, prior convictions of the defendant. However, in Spencer v. Texas, 385 U.S. 554 (1967), this Court upheld the Texas practice of reading the prior convictions to the jury at a one-stage trial despite Spencer's claim that the Texas use of prior convictions was so egregiously unfair upon the issue of guilt or innocence as to offend due process and thus deprive him of a fair trial.

This Court recognized that there was a possibility of some collateral prejudice with this procedure but decided that on a general "fairness" approach, the Fourteenth Amendment is not violated because another method may seem to be fairer or wiser, or to give a surer promise of protection to the prisoner at bar. As Mr. Justice Stewart recognized in his concurring opinion in Spencer,

> "If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion . . .But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in these recidivest cases. The question is whether those procedures fall below the minimum level the Fourteenth Amendment will tolerate.

> Upon that question I am constrained to join the opinion and judgment of the Court." 385 U.S. at 569.

Mr. Chief Justice Warren and Mr. Justice Fortas, in their concurring and dissenting opinion held that even though they felt the procedure was prejudicial, the prejudicial impact was not so great as to warrant retroactive application.

An even greater possibility of prejudice (than might be generated by the reading and proof of prior convictions for punishment enhancement) is found in the use of multi-count indictments and multi-defendant trials as permitted by Rules 8 and 13 of the Federal Rules of Criminal Procedure. Under the authority of these rules, promulgated by this Court, an information charging 225 separate and distinct crimes was upheld in United States v. Taylor, 207 F.2d 437 (2nd Cir. 1953). In Brandenburg v. Steele, 177 F.2d 279 (8th Cir. 1949), the defendant was indicted for 11 separate offenses of unlawful sales of narcotic drugs. In discussing Rules 8(a) and 13 of their predecessor statute, the Court observed:

> ". . .In view of the statute and the Rules prescribed by the Supreme Court above referred to, which authorized the procedure which resulted in the appellant's conviction, it is obvious that he is entirely mistaken in his assertion about denial of due process. He was dealt with in accordance with

> long established and conventional federal procedure."

In United States v. Weber, 437 F.2d 327 (3rd Cir. 1970), cert. denied 402 U.S. 932, the Court upheld the use of an eight count indictment which charged both "malum in se" and "malum prohibitum" offenses. The Court said at page 333:

> "In the absence of an affirmative showing of impermissible harm, the mere fact that the crimes carry different labels is not determinative." (Emphasis supplied).

Surely the impact upon a jury is just as great -- where a multi-count indictment is read to them at the beginning of a trial and proof is offered as to all offenses -- as where a defendant is exhibited to a jury in jail clothes. Nevertheless, the federal practice of multi-count indictments (and multi-defendant trials) finds continued sanction in federal decisions.

Petitioner would strongly urge that a trial of a defendant in jail clothes be equated with the Federal Rule 8 and 13 practice and that this Court should decide that no conviction, where a defendant is tried in jail clothes, be overturned "in absence of an affirmative showing of impermissible harm".

2. SINCE THERE MAY BE A POSSIBILITY OF SOME UNFAIRNESS TO A DEFENDANT WHO IS TRIED IN JAIL CLOTHES, A RULE

PROSCRIBING THE TRIAL OF A DEFENDANT IN JAIL CLOTHES SHOULD BE ACCORDED ONLY PROSPECTIVE APPLICATION.

In determining whether a new rule is to be given retroactive application, this Court has held that the criteria guiding resolution of the question implicates (a) the purpose to be served by the new standard, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard. Stovall v. Denno, 388 U.S. 293 (1967). This Court has given complete retroactive effect to a rule, where the " 'major purpose' of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious question about the accuracy of guilty verdicts in past trials. . ." Williams v. United States, 401 U.S. 646 (1971). Examples are the right to counsel at trial, Gideon v. Wainwright, 372 U.S. 335 (1963); on appeal, Douglas v. California, 372 U.S. 353 (1963); or at some forms of arraignment, Hamilton v. Alabama, 368 U.S. 52 (1961).

This Court recognized in Johnson v. New Jersey, 384 U.S. 719 (1966), that the question of whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact finding process at trial is necessarily a matter of degree, and is a question of probabilities.

Petitioner respectfully submits that the trial of a defendant in jail clothes is not so fundamentally unfair that it will infect a criminal proceeding with the clear danger of convicting the innocent. Although this Court recognized that it was unfair to have a defendant appear in a lineup without the aid of counsel, United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967), the probabilities of infecting the integrity of the truth determining process by denial of counsel at the line-up were not so great as to justify giving the decision retroactive application. Petitioner would urge that the trial of a defendant in jail clothes, when related to guilt or innocence is not so great as to undermine "the very integrity of the fact finding process" and to involve a "clear danger of convicting the innocent." Linkletter v. Walker, 381 U.S. 618 (1965). See also Adams v. Illinois, 405 U.S. 278 (1972), where this Court held that although the presence of an attorney at a preliminary hearing could make a significant contribution to the enhancement of the fact finding process, the lack of counsel at such hearing was not so fundamentally unfair as to require retroactive application.

Insofar as the reliance on past decisions is concerned, Petitioner wishes to point out that the Fifth Circuit had not, prior to Hernandez, set aside a state conviction solely because a defendant was tried in jail clothes. Trial in jail clothing was discussed in Brooks v. State of Texas, 381 F.2d 619 (5th Cir. 1967), but the discussion on jail clothing was dicta, as the decision granting relief was based on the ineffective assistance of counsel. Courts in other circuits prior to the decision in Hernandez had ruled that trial in jail clothes was not inherently unfair and required the prisoner to show prejudice.

See McFalls v. Payton, supra. Of greater significance is the fact that a federal district judge in Houston, Texas, ruled in 1970, three years after the decision in Brooks, that trial in jail clothing was not inherently prejudicial. See Xanthull v. Beto, 307 F.Supp. 903 (S.D. Tex. 1970). In view of the fact that these courts had indicated after Brooks, that trial in jail clothes was not inherently prejudicial, the state was not unjustified in allowing trial of defendants wearing jail clothes in the absence of an objection by the defense.

Although the Fifth Circuit indicates that Williams was compelled to wear a prison uniform at his trial, the record does not support this conclusion. The United States District Court in its opinion held that the state trial judge in Williams had a practice of allowing defendants to stand trial in civilian clothing if requested, and that this practice was followed by certain of the other trial judges in Harris County, Texas. See Ex Parte Kelly, 484 S.W.2d 773, 774 (Tex.Crim. 1972). In the Kelly case, an attorney in private practice who had been a prosecutor in the state district court testified that the trial judge would, upon request, arrange to have any defendant tried in civilian clothes. Further, he testified that the reputation of the judge prior to the decision in Hernandez v. Beto, supra, was that he would always allow any defendant who so desired to be tried in civilian clothes. The lawyer testified that on one occasion the trial judge furnished one of his own suits to a defendant who wore it during the trial.

In the case at bar, the affidavit of an attorney who practiced in the court in which

Williams was convicted stated that

> "From my past associations and dealings with Judge Love, it is my opinion that he would have sustained any objection to a defendant's wearing jail clothes and would have made every reasonable attempt to see that the defendant was supplied with civilian clothing to wear at a trial." (Ex. 193, 194).

In addition the certificate of the state court trial judge who tried Williams states that if at any time a defendant or his attorney made known to him before or during a trial that he did not wish to be tried in jail clothing, the trial judge would have granted his request and permitted him time to obtain civilian clothing to wear at his trial. The trial judge further certified that had such a request been made by Respondent Williams, he would have granted the request and permitted him to be tried in civilian clothing. (Ex. 186-188). The prosecutor at Williams' state court trial testified at the federal habeas hearing that Judge Love's policy in regard to the wearing of jail clothes as of 1970 was

> "If anybody ever made an objection we would permit people to bring up clothes and dress them out, let them use the jury room. In fact, one instance, a defendant was tried in Judge Love's suit. This was prior to this. Judge Love lent him

> a suit, not the one he had on, he didn't go out in just his robe, he got another suit and lent it to the man. I remember this happened, and on several occasions he had people that came up that brought clothing from home and we permitted them to dress back in the jury room." (A. 86,87).

Petitioner has pointed out this testimony to show this Court that defendants were not compelled or forced to go to trial in jail clothing. While it may have been customary for defendants to be outfitted with jail uniforms while they were in jail pending their trial, and while it may have been customary for them to be brought to trial in these uniforms, it was also customary for them to be tried in any type of clothing they wished, provided they or their attorney made such a request to the state court trial judge. Petitioner would state that to the best of his knowledge, no courts in the State of Texas have tried defendants in jail clothing since the Hernandez decision was handed down by the Fifth Circuit on April 15, 1971.

The effect on the administration of justice of the Fifth Circuit's unequivocal holding that trial in jail clothes infringes a fundamental right to the presumption of innocence has caused a flood of writs to be filed by prisoners tried or contending they were tried in their prison clothes. In the State of Texas alone, there have been 10 cases considered by the Fifth Circuit on the jail clothes issue and 9 more are in the process of being appealed. There

are at present 13 cases pending in the United States District Courts on the prison clothes question. These statistics do not include the jail clothes cases in the state courts of Texas and which will be in the federal courts upon the exhaustion of state court remedies.

The decision in the instant case holding that waiver of a jail clothes objection cannot be inferred from failure to object if trial in prison garb is "customary" in the jurisdiction will serve as a stimulus to all defendants to claim error by contending they were tried in jail clothes. Any defendant who was tried in his prison clothes on either a primary conviction or a prior conviction used for enhancement will be entitled to a new trial under the holding of the Fifth Circuit, subject to the showing by the State of overwhelming evidence of guilt or an admission from a defendant's attorney that he allowed the defendant to be tried in jail clothes to invoke jury sympathy.

In an attempt to preclude any significant adverse effect upon the administration of justice, the Fifth Circuit in their decisions on jail clothes following Hernandez has held that where proof of a defendant's guilt is overwhelming, the trial of a defendant in jail clothes may be harmless beyond a reasonable doubt. See Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973). The Hernandez and Thomas holdings are judicially illogical for if trial in jail clothing infringes upon the presumption of innocence and destroys the fundamental fairness of a trial, the presumption cannot be resuscitated and the trial cannot be resurrected by any amount of strong and

convincing evidence of guilt. In their attempt to minimize the effect of Hernandez upon the administration of justice, the Fifth Circuit is establishing case law that is inconsistent and will generate many judicial problems.

Petitioner respectfully submits that a defendant's conviction should not be overturned when, as here, the evidence clearly shows that (a) the defendant was not forced to wear jail clothes, (b) his attorney was competent and did not object to the defendant's being tried in jail clothes, and (c) the trial judge would have permitted the defendant to wear civilian clothing upon a request. For these reasons, Petitioner would ask this Court to hold that any decision proscribing a defendant's trial in jail clothing be applied prospectively only.

CONCLUSION

For the reasons here given, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

DUNKLIN SULLIVAN
Assistant Attorney General

Attorneys for Petitioner

P.O. Box 12548, Capitol Station
Austin, Texas 78711

PROOF OF SERVICE

I, Dunklin Sullivan, a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Brief Of The Petitioner has been served on the Attorney for Respondent by placing same in the United States Mail, certified, postage prepaid, addressed to: Mr. Ben L. Aderholt, Attorney at Law, 711 Fannin, Suite 1100, Houston, Texas 77002, on this the ____ day of March, 1975.

DUNKLIN SULLIVAN
Assistant Attorney General

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-676

W.J. ESTELLE, JR.,

Petitioner,

v.

HARRY LEE WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

BEN L. ADERHOLT
609 Fannin Street
Houston, Texas 77002
Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-676

W.J. ESTELLE, JR.,

Petitioner,

v.

HARRY LEE WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 500 F.2d 206.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on September 6,

1974, and the Petition for Certiorari was filed in this Court on November 29, 1974. Certiorari was granted on January 27, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), and Section 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District . . . ."

The Fourteenth Amendment provides:

". . . . no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

QUESTIONS PRESENTED

1. Whether the State action requiring Respondent to wear a prison uniform deprived him of due process of law and equal protection of the laws?

2. Whether Defendant's trial in a prison uniform substantially impaired the reliability of the jury's determination of guilt and so fundamentally affected the integrity of the judicial process?

STATEMENT OF THE CASE

Respondent Williams was certified an indigent by the 177th District Court of Harris County, Texas and an attorney was appointed for the trial. However, the lawyer who actually conducted the trial was retained by Respondent. The Respondent has remained incarcerated since his arrest. Respondent was tried before a jury in a prison uniform in the 177th District Court of Harris County, Texas in November, 1970 for assault with intent to murder with malice and was sentenced by the Court on December 9, 1970 to ten years in the penitentiary. The Trial Court appointed present counsel for purpose of appeal. The conviction was appealed by appointed counsel upon the issue of ineffective counsel and the issue of trial in a prison uniform. The conviction was affirmed in an opinion delivered February 9, 1972, styled *Williams v. State*, 477 SW2d 24 (Tex. Crim. 1972), reh. den.

In March, 1972, Respondent filed his Petition for a Writ of Habeas Corpus in The United States District Court for the Southern District of Texas and on October 2, 1973, the District Court denied relief holding that Williams' trial in jail clothing, while inherently prejudicial, was, under the facts presented, harmless error. Williams appealed this decision to The United States Court of Appeals and on September 6, 1974, the Fifth Circuit reversed the ruling of The United States District Court holding that Williams' trial in jail clothing was inherently prejudicial and was not harmless error.

SUMMARY OF ARGUMENT

1. The State of Texas, by and through the Sheriff of Harris County compelled the Respondent to wear his prison uniform by denying his request for his civilian clothes which were at hand. All non-bailed defendants, including Respondent, were tried in prison uniforms.

The record is replete with seeds of reasonable doubt as to Respondent's guilt of assault to murder with malice. In particular, there is strong evidence of provocation, of unequal size of the combatants, and of the absence of malice in Respondent.

Had the Respondent been availed of his right of due process, the jury could have reached a verdict of not guilty, or have found Respondent guilty of assault with intent to murder without malice.

2. The presumption of innocence is a fundamental element in our concept of due process. The great weight of authority holds that a defendant is entitled to be tried with the appearance, dignity, and self-respect of a free and innocent man. It is, therefore, inherently unfair to try a man in his prison uniform. This had been the rule long before the trial of Respondent. It came to be known in 1971 as the Hernandez Rule.

The wearing of a prison uniform is a condition imposed upon the accused by the State for the convenience of law enforcement agencies and correctional departments. A prison uniform is, therefore, a badge of criminality.

Respondent's trial in prison garb before a jury substantially impaired the reliability of the jury's determination of guilt and fundamentally affected the integrity of the judicial process.

Even if this is considered a new constitutional doctrine, it meets the three criteria for according it retrospective application.

ARGUMENT

I.

THE STATE ACTION REQUIRING RESPONDENT TO WEAR A PRISON UNIFORM DEPRIVED HIM OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

The Fourteenth Amendment to the United States Constitution, Section 1, prohibits any State action which abridges the privileges or the immunities of the citizens of the United States, which deprive any person of due process of law or equal protection of the laws. The State of Texas, by and through the Sheriff of Harris County, compelled Respondent and all other persons unable to afford bond to wear a prison uniform during their jury trials. Respondent requested his civilian clothes so that he could avail himself of the advantage of appearing at his trial as an innocent and ordinary citizen. This request was refused by the jailor. (Appendix 72-74.) The prosecutor identified the Respondent's attire at the jury trial as "jail clothing". (Exhibits 35, 42, 87.)

The United States District Court, in its evidentiary hearing, found the records clearly showed there existed the practice in Harris County to try incarcerated defendants in prison uniforms. *Williams v. Beto*, 364 F.

Supp. 335, 343 (S.D. Tex. 1973). Respondent's Exhibit No. 7 shows that every defendant not released on bond who was tried before a jury in the 177th District Court, was tried in a prison uniform. (Exhibit No. 7 was inadvertently omitted from the Exhibits printed in this cause. The Exhibit was admitted into evidence. (Appendix 43.) The United States District Court referred to testimony that "all non-bailed Defendants were tried in jail garb at that time." (*Williams v. Beto*, 338.)

It is not surprising that those defendants who were tried in a prison uniform, were in jail because they were unable to make bond. Those defendants and Respondent were simply poor people. The facts of their poverty and their inevitable trial before a jury in prison garb are inextricably connected.

There is substantial testimony at the evidentiary hearing that if the Respondent's request to wear his civilian clothes had been granted, a different result may have been reached by the jury. Respondent's trial counsel testified that it would have made an impact upon the jury (Appendix 47, 48). He further stated that the Respondent's appearance in a prison uniform could have made an unfavorable impression (Appendix 64). Since Respondent did not take the stand in his trial, his appearance was crucial. Respondent testified at his evidentiary hearing that if his request to wear his civilian clothes which were at hand had been granted, his improved appearance would have created a different impression on the jury (Appendix 74).

The established rule in the Fifth Circuit holds that the trial of an accused dressed in prison clothes infringes upon the fundamental right to the presumption of innocence. This line of authority is found

in nine cases beginning with *Brooks v. Texas*, 381 F.2d 619 (1967); *Hernandez v. Beto*, 443 F.2d 634 (1971); *Garcia v. Beto*, 452 F.2d 655 (1971); *United States v. Fideler*, 457 F.2d 921 (1972); *Goodspeed v. Beto*, 460 F.2d 398 (1972); *Hollins v. Beto*, 467 F.2d 951 (1972); *United States ex rel Stahl v. Henderson* 472 F.2d 556 (1973); and ending with the decision in *Thomas v. Beto*, 474 F.2d 981 (1973). A reading of these cases makes it apparent that the test in the Fifth Circuit is whether the defendant (1) willingly, intelligently, and knowingly waived his right to not be tried in prison garb and, if not, whether the probable impact upon the jury by trying him in prison garb was harmless beyond a reasonable doubt, (2) taking into consideration whether all material facts lead unerringly to defendant's guilt.

Respondent's jury was charged, under the Texas law, as to the offense of assault with intent to murder with malice aforethought and assault with intent to murder without malice aforethought. (Exhibits 8, 9, 15). It is Respondent's position that he suffered actual prejudice constituting a denial of due process when he was compelled to appear before his jury in a prison uniform. Had the Respondent enjoyed the appearance, dignity, and self respect of a free and innocent man, the jury, under the circumstances, may well have found him not guilty or guilty of murder *without* malice.

The most recent Fifth Circuit decision, *Thomas v. Beto* 474 F.2d 981 stated the test to be applied under the particular facts in that case:

> ". . . a jury could have believed the injury, not intoxication, caused the observed symtoms [sic] other than odor. Given this bare possibility, this Court

was unable to conclude that the error of infringing the presumption of innocence by a trial in jail clothing, carried no seed of reasonable doubt as to harm. In Thomas on the other hand, we can perceive no possible inference which clouds or conflicts any essential or material fact. Rather, all such facts lead unerringly to guilt. Thus, our judgment of the probable impact of the prison garb trial on the minds of an average jury differs in the present case." *Thomas*, 983.

The trial record in the case at bar is replete with "seeds of reasonable doubt" as to Respondent's guilt of assault with intent to murder with malice. Respondent was seated quietly talking with his former neighbors when three belligerent people (Neatherlin, Stacy and Tolley) one of which was armed, confronted him with accusations. Respondent was older, weaker and shorter than Neatherlin (Appendix 75) the principal attacker, who falsely accused Respondent of the criminal conduct of giving "hot checks" and further accused him of leaving his apartment filthy and then ordered the Respondent to leave the apartment complex and his friends.

Trial counsel cross-examined a witness, Mrs. Williams, as follows:

"Q. When Mr. Neatherlin walked up to you where you and Mr. Williams and Mrs. Owens were, who was with Mr. Neatherlin at that time, anyone?

A. Well, that lady, I don't know her name, and Bill Stacy, he was with him. (Exhibit 151, 152)."

Trial counsel examined one of the three "confronters", Bill Stacy, as follows:

"Q. You stated that when you left your apartment you took your gun with you, put it behind you, is that correct?

A. That is correct.

Q. Did you know Mr. Williams prior to that time?

A. Never saw him before in my life. (Exhibits 97)

Q. Did you show that pistol at any time prior to then?

A. No, sir, had no reason to.

Q. But it was in the belt of your trousers?

A. Yes sir.

Q. It was not covered by a shirt or anything?

A. No sir, I don't believe I had a shirt on. No sir. (Exhibits 102)

The Prosecutor, on direct, examined the complaining witness, Mr. Neatherlin:

"Q. Now, what first occurred when you and Mrs. Tolley and this Defendant met out there? What was the first thing you said to this Defendant, Mr. Williams?

A. I believe I asked him to pay off his hot checks.

Q. Did he say hello to you to begin with, or was there any words or greetings exchanged?

A. No sir.

Q. Did he say hello to Mrs. Tolley?

A. I believe so." (Exhibits 51)

On cross-examination of Mr. Neatherlin, he stated:

"Q. What disposition have you made of those checks as of this time?

A. Well, this lady paid them off that he came over there to see. Her husband is the one that gave the checks.

Q. Her husband gave the checks?

A. To him and he gave them to my wife for his rent.

Q. Then I gather from your statement he was not the original maker or original signer of that check?

A. No sir. He didn't sign the check. He was smarter than that." (Exhibits 65, 66)

It is clear from the record that the Respondent was not at the scene with any malice towards anyone or with the purpose of causing any breach of the peace. It is also clear that Neatherlin and his two companions were bent on creating a disturbance and making false accusations against the Respondent in front of his friends. The competent testimony at the trial shows that the argument between the parties developed into a shoving match and that the Respondent's knife appeared mid-way through the fight after the Defendant was hit in the face and knocked to the ground.

Upon cross-examination, Mr. Neatherlin testified:

"Q. But could you have been cut there at a later period instead of that first time you said his hand went back?

A. I don't know about that.

Q. But you don't know definitely that he did cut you at that moment?

A. I never did know when he cut me at any moment. I never did feel it.

Q. But after his hand went by your neck you hit him and knocked him down, is that correct?

A. That is correct.

Q. And did you not see a knife at that time, and did you not know you were cut?

A. I never saw the knife at any time.

Q. After you knocked him down he got up?

A. Yes sir.

Q. And you knocked him down again?

A. He got up and run back toward me.

Q. Were you angry when you knocked him down?

A. Yes sir." (Exhibits 62, 63)

"Q. And prior to knocking him down the only thing that he had done as far as moving toward or anything was –

A. Hit me across the neck.

Q. Well, did he hit you or did you say he cut – his arm went back, you said you did not feel anything?

A. Well, I felt it when he hit my neck but I didn't know I was cut.

Q. Whatever happened, it was no pain or no hurt to you at that time?

A. No sir." (Exhibits 64)

There is no direct evidence that the Respondent used the knife the very first blow. Following the first one-handed "push" by the Respondent against Neatherlin, Neatherlin immediately knocked the Respondent down time and time again. Upon cross-examination, Mr. Stacy testified:

"Q. But immediately after this movement Mr. Neatherlin knocks the Defendant down to the ground?

A. That is correct.

Q. And you stated he knocked him down several times?

A. No I didn't state that. I said he knocked him down once.

Q. Did he knock him down several times?

A. Yes he did." (Exhibits 100)

Mr. Neatherlin testified that he knocked the Respondent down about three times. (Exhibits 67) However, another witness, Mrs. Owens, testified:

"Q. How many times did Mr. Neatherlin strike this Defendant? A number of times? Many times?

A. Well, at least five or six. I am not real positive. I didn't count them....

Q. Did you ever see this Defendant knock Mr. Neatherlin down?

A. No. He didn't knock him down." (Exhibits 134)

In view of such testimony, and by applying the Thomas test, there should be no question that a jury could have found that Respondent was guilty of the lesser included offense of assault to murder without malice; or, at least there is a bare possibility or some possible inference that Respondent was possessed of sudden passion such that the Respondent's mind was not sufficiently cool to enable him to know and understand what he was doing and the consequences.

Further, the jury could have had reasonable doubt as to whether the small pocket knife which cut the complaining witness was a "deadly weapon". A pocket knife is not per se a "deadly weapon" under Texas law. *Blount v. State*, 376 S.W.2d 844; *Abels v. State*, 489 S.W.2d 910. Also, the jury could have believed that Neatherlin, the complaining witness, presented an apparent danger to the Respondent on the basis of the testimony that the complaining witness was accompanied by companions, had accused the Respondent of a criminal act. Neatherlin generally acted in a belligerant manner and made the first overt threatening act. *Christesson v. State*, 353 S.W.2d 218; *White v. State*, 354 S.W.2d 158.

It is also important to note that the Texas law fixing the punishment for the crime of which Respondent was convicted has been changed within the past several years. Article 1160 of the Texas Penal Code was amended in 1971 to increase the penalty for assault to murder with malice. However, the Penal Code effective January 1, 1974, reduced the minimum penalty for this crime in Section 22.02 (a).

In summary, the facts of this criminal transaction show that on May 20, 1970, while it was still daylight (Exhibits 120), the Respondent went to visit Kay Tolley in the City of Houston, Texas. While he waited at her apartment for her return, he sat on the porch and talked with the neighbors (Exhibits 123). Ray Neatherlin, Bill Stacy and Kay Tolley approached Respondent. Respondent has previously been a resident of the apartment. Neatherlin demanded Respondent to pay "hot checks" and for unpaid rent and for leaving an apartment dirty. (Exhibits 51, 89). Respondent denied the charges. (Exhibits 52, 132). Respondent was, in fact, not the maker of the checks and the checks had already been paid. (Exhibits 65, 66). Neatherlin was 58 years old (Exhibits 69) and weighed approximately 200 to 215 pounds (Exhibits 65). The Respondent was approximately 64 years of age and was characterized as being of "frail body" (Exhibits 21). A witness stated that Neatherlin was larger, more robust and physically stronger than Respondent. (Exhibits 157). Respondent was dressed in a suit (Exhibits 129) and seated on a porch talking with neighbors awaiting Miss Tolley when Neatherlin, Stacy and Tolley hurriedly arrived to confront the Respondent (Exhibits 83). Neatherlin and Stacy arrived without shirts and Stacy was armed.

(Exhibits 73, 85). Neatherlin told the Respondent to leave the property and a shoving match began. It soon developed into a fight during which Neatherlin discovered he had been cut with a pocket knife and was taken to a hospital and Respondent was thereafter arrested.

Therefore, in terms of the Thomas test, all essential and material facts do not lead unerringly to Respondent's guilt of assault with intent to murder with malice.

REPLY TO PARTICULAR ARGUMENTS OF PETITIONER

Respondent would reply to the Petitioner's argument on page five of his brief where he asserts that jurors "expect a defendant to appear in the courtroom in jail uniform" and that such an appearance is no more prejudicial than the reading of the indictment. Under Texas law, the Court must charge the jury as to the true function of an indictment in order to avoid the natural prejudicial effect of the existance of the indictment. Respondent submits that jurors know very well that the average citizen may post bail. Only under unusual circumstances does the accused remain in jail, especially for as long as the Respondent did in this case. Respondent (in the second half of this brief) cites cases at length in many jurisdictions which condemn the trial of a Defendant in a prison uniform.

Petitioner asserts that there exists no Federal case which had set aside a conviction solely because a

defendant was tried in jail clothes. Petitioner has overlooked *Dennis v. Dees*, 278 F. Supp. 354 (USDC, La 1968). Further, Respondent grounds his entire position upon *Xanthull v. Beto*, 307 F. Supp. 903 (S.D. Tex. 1970) which was specifically overruled as being out of step with the line of authority by *Hernandez v. Beto*, 443 F.2d 634 (5th Cir. 1971).

Respondent urges as persuasive material the statements of three of the twelve jurors in *Scruggs v. Estelle*, No. 74-3180 pending in the Fifth Circuit. We do not know what the other nine jurors believed about the prejudicial effect of trying a defendant in a prison uniform. One of the jurors, Juror Austin (Page 8 of Respondent's Brief), could not identify the Defendant's apparel as being a prison uniform.

In the case at bar, the prosecutor, perhaps as a trial tactic, first made reference to the Respondent's prison uniform (Exhibits 30). At no time did the prosecutor attempt to cure, as to the entire jury panel, the prejudicial effect of the Respondent's appearance in a prison uniform. In each of the two instances in which the prosecutor referred to the Respondent's prison uniform (Exhibits 30, 33), his skilful questions were directed to a single juror (Juror Weaver the first time, and Juror Bell the second) in a compound and multifarious inquiry.

Jurors cannot fully anticipate the impact of a defendant's appearance until all of the evidence has been taken. What a juror says he will consider and what he actually considers at the time of final deliberation are sometimes too very different things. The Respondent did not testify nor did he call any witnesses. His appearance, therefore, became an

important consideration to the jury.

The Respondent also urges this Court to consider the affidavit of an attorney which was admitted as his Exhibit #2 (Exhibits 190). All four of the Petitioner's exhibits were ex parte statements to which the Respondent vigorously objected (Appendix 64, 65, 66). All of Respondent's exhibits (depositions) were available prior to trial for Petitioner's cross-examination. None of Petitioner's exhibits were.

Petitioner asserts at page 20 in his Brief that the record does not support either the United States District Court or the Fifth Circuit conclusion that Respondent was compelled to wear a prison uniform at his trial. The basis for the conclusion that Respondent was compelled is twofold: Respondent's request for his civilian clothes which had been prepared for him was denied (Appendix 73, 74) and secondly, it was a uniform practice to try all non-bailed defendants in their prison uniforms (Appendix 72, 99; Exhibits, Williams' Exhibit No. 7).

The Petitioner states several times in its brief that the trial judge would have allowed the Respondent to be tried in his civilian clothes if he had only requested it. Respondent submits that every shread of evidence to support Petitioner's contention is based upon hindsight and good intentions, especially in view of the stror.g decision handed down in Hernandez. The hard evidence in this case demonstrates that no one knew of the trial judge's good intentions in the face of the universal practice in Harris County to try non-bailed defendants in their prison uniforms.

Respondent's trial counsel testified at the evidentiary hearing that the Respondent's trial in his prison

uniform was not a trial tactic (Appendix 47), he intended to elicit no sympathy (Appendix 47, 68), he intended no waiver of his right (Appendix 48), he considered it a futile objection (Appendix 58, 62), that he was aware of the practice to try non-bailed defendants in a prison uniform (Appendix 49), his previous experience in objecting to prison uniform was futile (Appendix 49, 63), he had been in Judge Love's Court before (Appendix 52), he never saw an objection nor a change out of prison uniform allowed (Appendix 58, 59, 62).

The prosecutor in the Respondent's case admitted that he had experienced jurors who were hostile to those defendants who appeared in a prison uniform (Appendix 85). Such a practice is unfair and should not be tolerated in our judicial process. The Petitioner has assumed the position at p. 22 of his brief that no Courts in the State of Texas any longer tolerate the trial of a defendant in a prison uniform since the Hernandez decision was announced on April 15, 1971.

Petitioner's enlightening statement abundantly demonstrates the salutary effect upon our judicial system of the Hernandez doctrine. Likewise, the announcement by this Honorable Court of such a beneficial doctrine would put an end to the jail garb controversy. The Courts would then be left with only a few pre 1971 jail garb cases.

II.

THE TRIAL OF RESPONDENT IN A PRISON UNIFORM SUBSTANTIALLY IMPAIRED THE RELIABILITY OF THE JURY'S DETERMINATION OF GUILT AND SO FUNDAMENTALLY AFFECTED THE INTEGRITY OF THE JUDICIAL PROCESS.

A. Cases Determined Prior to Respondent's Trial

The presumption of innocence is such a fundamental part of our American judicial system that the courts uniformly have incorporated that right into our concept of due process. *United States v. Thoresen*, 428 F.2d 654, 661 (9th Circuit 1970); *Government of Virgin Islands v. Lake*, 362 F.2d 770, 774 (3rd Circuit 1956); *Dennis v. Dees*, 278 F. Supp. 354 (E.D. La. 1968); *Coffin v. United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L.Ed. 481 (1895); *Hernandez v. Beto*, 443 F.2d 634 (5th Circuit 1971). In Volume 21 Am Jur 2d, Crim. Law, Section 239, we find the following language:

> "Since the defendant, pending and during the trial, is still presumed innocent, he is entitled to be brought before the Court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the Court may otherwise require. He is therefore entitled to wear civilian clothes rather than prison clothing at his trial."

The majority of cases in jurisdictions from coast to coast since 1938, at least, have declared that it was error to try a defendant in a prison uniform before a jury. In *Collins v. State*, 106 P.2d 273, 278 (1940) the Oklahoma Court stated:

> "However apparent the guilt of the defendant might have been, he is still clothed with the presumption of innocence and is entitled upon his trial to wear his civilian clothes."

See also *Shultz v. State*, 179 So. 764 (1934), a Florida decision; *Eaddy v. People*, 174 P.2d 717 (1946), a Colorado decision; *People v. Zapata*, 34 Cal. Rptr. 171 (D.C. App, 1963), cert. den. The Texas Court of Criminal Appeals in January, 1966 declared that the Trial Court was correct in granting the defendant's motion to be tried in civilian clothing, especially in view of the Court's long standing rule which condemned the trial of a defendant in handcuffs, *Clark v. State*, 398 SW.2d 763 (1966). However, the Texas Court of Criminal Appeals in *Xanthull v. State*, 403 SW.2d (1966) found that the defendant failed to show injury or prejudice by his trial in jail clothes.

In 1967 the Fifth Circuit laid down in rather absolute language what is still the policy statement of that Court:

> "It is inherently unfair to try a defendant for a crime while garbed in his jail uniform, especially when his civilian clothing is at hand. No insinuations, indications, or implications suggesting guilt should be displayed before the jury, other than admissible evidence and permissible argument." *Brooks v. Texas*, 381 F.2d 619 (5th Circuit 1967).

Three years later, Xanthull again, unsuccessfully, raised the jail garb issue in the United States District Court, *Xanthull v. Beto*, 307 F. Supp. 903 (S.D. Tex. 1970). The next year, the Fifth Circuit specifically and strongly disapproved the Xanthull decision. The Fifth Circuit reaffirmed the language of Brooks:

"What was inherently unfair in *Brooks v. Texas*, supra, is also inherently unfair in this case. There is little doubt in this Court's mind that negative inferences can be, and more than likely are, created in the minds of the jurors when the accused is brought into Court and tried in prison clothing.

'We conclude that trying Hernandez in his prison clothing infringed a fundamental right – the presumption of innocence." *Hernandez v. Beto*, 443 F.2d 634, 636.

Judge Singleton, who conducted the evidentiary hearing for Hernandez, had found that the evidence of guilt was overwhelming and that the evidence in support of the defense was almost nil, and so trying the defendant in prison garb was harmless error. Said the Fifth Circuit

"The test used by the District Court to determine whether the error was harmless was improper. Before a Federal Constitutional error can be held harmless the Court must be able to declare a belief that it was harmless beyond a reasonable doubt.

'Under the circumstances, we cannot equate the inherent unfairness of being tried in prison garb with harmless error. The probable impact on the jury of Hernandez' appearance in the Courtroom makes it impossible for us to declare a belief that it was harmless beyond a reasonable doubt.'" *Hernandez*, 637

(Perhaps this is an inherent right reserved to the individual by the Ninth Amendment. See Patterson, *Forgotten Ninth Amendment*.)

On Rehearing, the Fifth Circuit added a few comments in order to put the rule into better perspective:

"A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error."

But when the defendant does not object because the Court's practice is to try jail cases in prison garb, the Court stated, "We cannot accept this as a voluntary waiver." *Hernandez*, 637.

In the same year that Brooks was decided, The United States District Court for the Eastern District of Pennsylvania stated that an appearance before a jury in prison garb prejudices a defendant's constitutional right to a fair trial. Further, even a trial before a judge in prison garb could involve constitutional considerations. *United States v. Social Service Department*, 263 F. Supp. 971, 975 (1967).

The next year, The United States District Court for the Eastern District of Louisiana held that the appearance of a defendant before a jury in a prison uniform was the very antithesis of the "garb of innocence" and hence is a deprivation of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. *Dennis v. Dees*, 278 F. Supp. 354, 358 (1968). The same result was reached in *People v. Shaw*, 164 NW.2d 7 (Michigan 1969).

The Texas Court of Criminal Appeals in January of 1970, citing *Brooks*, supra, was careful to state that every effort should be made to avoid trying a defendant in a prison uniform. *Ring v. State*, 450 SW.2d 85, 88. But the case is complicated because the Court found that the defendant plead guilty and failed to show that he was tried in an identifiable prison uniform. In the same year a Pennsylvania Court, citing *Eaddy*, supra, wrote as follows:

> "The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or the evidence awaiting presentation, every defendant is entitled to be brought before the Court with the appearance, dignity and self-respect of a free and innocent man . . ." *Commonwealth v. Keeler*, 264 A.2d 407, 410 (March, 1970).

About the same time, the Supreme Court of Arkansas in *Miller v. State*, 457 SW.2d 848, reversed a conviction on the principle that absent a waiver, the accused should not be tried in prison garb and that such a rule was in line with the strong majority in the country. (at Page 849).

The only other two cases of which Respondent is cognizant which were handed down prior to the date of Respondent's trial are *McFalls v. Peyton*, 270 F. Supp. 577 (W.D. Va, 1967) and *Wilkinson v. State*, 423 SW.2d 311 (Tex. Crim. App. 1968). The same Court decided *Hall v. Cox*, 324 F. Supp. 786 (W.D. Va, Feb. 1971) which decided McFalls. All three cases are pre-Hernandez (and Wilkinson specifically relied upon Xanthull) and, therefore, cannot be considered to be controlling authority.

B. Cases Decided After Respondent's Trial

The cases in point decided after the trial (November 1970) of Respondent continued to follow the trend of the cases heretofore cited.

The Fifth Circuit's opinion in *Hernandez v. Beto*, 443 F.2d 634, handed down in April of 1971, is clearly the landmark case on the prejudicial effect of the

defendant's appearance before his jury in prison uniform. Respondent has already quoted extensively from that opinion. Subsequent Fifth Circuit decisions were consistent in result with Hernandez. *Garcia v. Beto*, supra; *U.S. v. Fideler*, supra; *Goodspeed v. Beto*, supra; *Hollins v. Beto*, supra; *United States ex rel Stahl v. Henderson*, supra; and *Thomas v. Beto*, supra. In Garcia, the Court found that trial counsel had used defendant's appearance in jail clothes as a trial tactic. Defendant's choice to wear prison garb before the jury to elicit sympathy was a tactic of conscious design. He therefore waived his right to be tried in civilian clothes rather than jail clothes. *Garcia*, 655. The Georgia Supreme Court reached the same result in *Timmons v. State*, 156 SE.2d 68 (1967). There, the defendant agreed to be tried in a prison uniform. He waived what the law had established in his favor. (at p. 69). In *Fideler*, it was shown that there was no identifiable prison uniform used in the Webb County Jail. This fact must, of course, be shown in order to come under the Hernandez rule. In both *Goodspeed* and *Hollins*, the Fifth Circuit was concerned with what constituted a voluntary waiver. The Court found in the latter case, that since it was the Trial Court's practice to try defendants in jail clothing, the trial, even without an objection, did not constitute a voluntary waiver. *Hollins*, 952. In *United States v. Henderson*, the Fifth Circuit Court declared that, while there was no waiver of the error of being tried in prison garb, the facts made it impossible to try the case without relating to the jury that defendant was in prison since the defendant was being tried for the murder of a prison guard. This is the same result as was reached by an

Oklahoma Court in *French v. State*, 416 P.2d 171 (1966). The most recent decision by the Fifth Circuit was *Thomas v. Beto*. The Court characterized the test in terms of whether there was no possible inference which clouds or conflicts any essential or material fact and whether all such facts lead unerringly to guilt. *Thomas*, 983.

Besides the Fifth Circuit, the Tenth, Third and Ninth Circuits have written opinions on the jail garb issue.

The Tenth Circuit in *Watt v. Page*, 452 F.2d 1174 (Tenth Cir., 1972), cert. den. 405 U.S. 1070 (1972), stated that it did not agree with the Fifth Circuit holding in Hernandez to the extent that it appeared to require an automatic reversal if a defendant proved he was tried in jail clothing (at p. 1175). The case was returned to the U.S. District Court for an evidentiary hearing, at which the District Court found the defendant to be prejudiced because he was tried in a prison uniform. The Tenth Circuit Court then affirmed the lower Court's finding of prejudice. *Anderson v. Watt*, 475 F.2d 881 (Tenth Cir. 1973). The same rule was applied the next year in *United States v. Williams*, 498 F.2d 547 (1974). This case and *Garcia v. Beto*, by the Fifth Circuit reach precisely the same result. That there is no real conflict between the Fifth and Tenth Circuits is seen by a careful reading of the explanatory language by the Fifth Circuit when it stated, upon Rehearing, that "a defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." *Hernandez*, 637.

The Third Circuit likewise has accepted the majority view that compelling a defendant to appear before a jury in a prison uniform unconstitutionally infringes his due process right to be presumed innocent until proven

guilty. *Gaito v. Brierly*, 485 F.2d 86 (1973). This holding was reaffirmed in *Lemons v. United States*, 489 F.2d 344 (3rd Cir. 1974).

The Ninth Circuit has denounced the practice of trying a prisoner in jail clothes in stronger terms. In *Bentley v. Crist*, 469 F.2d 854, 856 (1972), the Court criticized the trial judge's finding that trying the accused in jail garb did not amount to a denial of the constitutional right to presumption of innocence, saying "this is contrary to the weight of authority in State and Federal Courts."

Other United States District Courts have recently handed down decisions following the Hernandez rule granting defendants relief upon their showing that they were unwillingly tried in a prison uniform before a jury. *W. W. Smith v. Beto*, (No. 71-H-830 United States District Court for the Southern District of Texas, May 1972); *Bates v. Estelle*, 360 F. Supp. 1278 (SD Tex. July 73); *St. Jules v. Beto*, No. 70-H-840 (S.D. Tex. 1974), (St. Jules' case was also in the 177th District Court of Harris County, Texas, but his trial was before that of Respondent.) *McWilliams v. Estelle*, 378 F. Supp. 1380 (S.D. Tex. 1974).

After the Hernandez rule was announced by the Fifth Circuit, the Texas Court of Criminal Appeals handed down approximately eleven cases on the jail garb point (in chronological order): *Ellis v. State*, 468 SW.2d 406 (June 1971); *Ephraim v. State*, 471 SW.2d 798 (July 1971); *Pratt v. State*, 474 SW.2d 243 (Dec. 1971); *Williams v. State*, 477 SW.2d 24 (Feb. 1972); *Barber v. State*, 477 SW.2d 868 (Mar. 1972); *Simmons v. State*, 480 SW.2d 633 (June 1972); *Prejean v. State*, 480 SW.2d 652 (June 1972); *Ex Parte Slaton*, 484

SW.2d 102 (Sept. 1972); *Ex Parte Kelly*, 484 SW.2d 773 (1972); *Wickware v. State*, 486 SW.2d 801 (Dec. 1972); *Patton v. State*, 489 SW.2d 906 (Feb. 1973).

Ellis, Pratt, Barber, Simmons and *Prejean* follow the same line of reasoning as the older case, *Wilkinson v. State*, supra, and of the Fifth Circuit's decision in *Fideler*, supra, which is to say, that the defendant has the burden of proving he was in fact tried in a prison uniform before he may invoke the Hernandez rule. All of the foregoing Texas cases generally apply the principle as stated in *Brooks v. Texas*, supra, viz., to try a defendant in prison garb infringes upon a fundamental right guaranteed to him by the United States Constitution.

The most recent decision Respondent has located on this issue is *People v. Roman*, No. 14,191 (New York Court of Appeals, Feb. 20, 1975). The New York Court, in reversing the conviction, declared that the defendant was entitled to appear in court with the dignity and self-respect of a free and innocent man, and to require him to appear in convict's attire was to deny him that right. The Court referred to the American Bar Association's Standards which specifically provide that "(a) an incarcerated defendant or witness should not be required to appear in court in the distinctive attire of a prisoner or convict." American Bar Association Project on Minimum Standards for Criminal Justice, *Trial by Jury*, Section 4.1 (b), App. Draft (1968).

The wearing of a prison uniform is a condition imposed upon the accused by the State of which he should be free. The condition is imposed for the convenience of law enforcement agencies and correctional departments of the State. A prison uniform is,

therefore, a badge of criminality. It is common knowledge that jurors are exceptionally responsive to physical variations among defendants and that negative subliminal factors and inferences increase in proportion to the defendant's unattractiveness.*

The unfairness of the situation created by the accused's appearance in a prison uniform is exacerbated because it is most likely brought about by the poverty of the accused. Respondent has proved that all of those defendants who were tried with him in the 177th District Court and who were non-bailed, were tried in their prison uniforms. At the same time, a man of even modest means could make bond, change his attire, and present himself to the jury in the best possible manner. The Respondent's appearance before his jury in a prison uniform, a badge of criminality, substantially impaired the reliability of the jury's determination of his guilt (in particular, the greater offense of assault with intent to murder with malice) and fundamentally affected the integrity of the judicial process.

C. Retrospective Application

After Respondent unsuccessfully prosecuted his direct appeal, he collaterally attacked his conviction upon the same grounds. Nevertheless, this Court should direct that a new trial be given the Respondent for the reason that his trial in a prison uniform before a jury substantially impaired the reliability of the jury's determination of guilt and fundamentally affected the integrity of the judicial process. As the right to be free from fundamentally unfair sentencing pre-dated Pearce,

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*Calven & Zeisel, *The American Jury*, 193,217 (1966).

the right to be free from an imposed badge of criminality, the prison uniform, pre-dated Respondent's trial. (see *Michigan v. Payne*, 412 U.S. 47, 36 L.Ed.2d, 736, 93 S. Ct. 1966 (1973).

Respondent's case meets the three criteria for retroactive application of a new constitutional doctrine as found in *Stovall v. Denno*, 388 U.S. 293 (1967). Those three criteria are: The purpose to be served by the new standards, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of retroactive application of the new standard.

The purpose of the Hernandez rule is to prevent the lessening of the burden of proof required of the State in order to obtain a verdict of guilty. Accused's appearance in a prison uniform throughout the trial is a constant reminder to the jury of all the negative inferences that such an appearance conveys, especially when the accused does not take the witness stand as in the case at bar. The importance of this element in our judicial process has been discussed by this Court on a previous occasion, when it said:

> "The reasonable doubt standard is a 'prime instrument' for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principal whose enforcement lies at the foundation of the administration of our criminal law . . . To this end, the reasonable-doubt standard is indispensible, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Ivan v. City of New York*, 407 U.S. 203, 32 L.Ed.2d 659, 661, 92 S. Ct. 1951 (1972)

This Court, in discussing the retrospective application of the Chimel doctrine, stated: "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impaires its truth – finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." This is so despite reliance by law enforcement officers or severe impact upon the administration of justice. "It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends. In these situations the new doctrine raises no question about the guilt of defendants convicted in prior trials." *Williams v. United States*, 401 U.S. 646, 28 L.Ed.2d 388, 395 (1971).

CONCLUSION

The weight of authority in this country has held it inherently unfair to try a defendant in a prison uniform. For the United States Supreme Court to confirm this fundamental right would not be a clear break with any previous constitutional doctrine. Thus there can be no reliance by law enforcement agencies or by prosecutorial arms of government upon any rule which might now be dissapproved. The Fifth Circuit indicated some desire to apply the Hernandez rule retroactively in *Goodspeed v. Beto*, 460 F.2d 398, 400. This was finally accomplished in *Williams v. Beto*, 500

F.2d 206. United States District Court for the Southern District of Texas accorded retroactive effect to Hernandez in *Smith v. Beto*, No. 71-H-830, May, 1972. The Texas Court of Criminal Appeals did likewise in *Ex Parte Slaton*, 484 SW.2d 102 (1972).

Finally, public policy considerations require this Court to direct that the Respondent obtain a new trial. To apply the Hernandez rule in its fullest bloom retroactively will not have an adverse effect on the administration of justice. The Hernandez doctrine applies to an extremely small percentage of those inmates in penitentiaries. It could only apply to those cases tried before a jury, on a plea of not guilty, with a record complete enough to prove that the defendant was tried *unwillingly* in a prison uniform, and which trial resulted in a guilty verdict, and where not all the material facts lead unerringly to defendant's guilt.

For this Honorable Court to announce such a rule will further prevent the continued abuse of the trials of an indigent in his prison uniform. To reverse this conviction will insure that this particular abuse is forever ended and will further help guarantee the purity of trial by jury in these United States.

For the reasons herein stated, the Judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

BEN L. ADERHOLT
609 Fannin Street, Suite 601
Houston, Texas 77002
Attorney for Respondent